

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,267

VALLEY TELECASTING CO., INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

DESERT TELECASTING COMPANY, INC.,

Intervenor

On Appeal From Decisions of the
Federal Communications Commission



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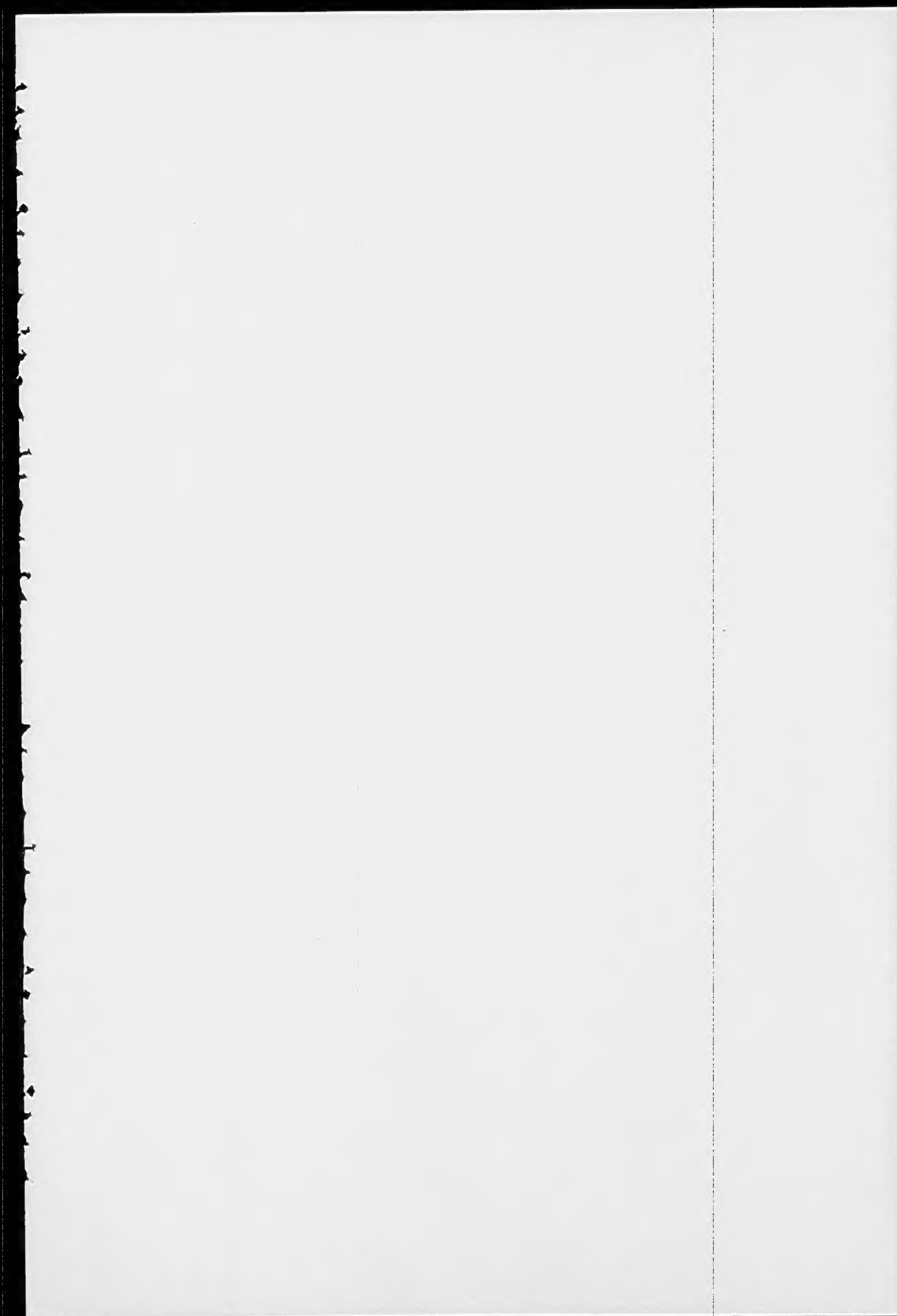
JOINT APPENDIX



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JOINT APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

VALLEY TELECASTING CO., INC.,)	
)	
Appellant,)	
)	
v.)	Case No. 18,267
)	
FEDERAL COMMUNICATIONS)	
COMMISSION,)	
)	
Appellee.)	

PREHEARING STIPULATION

The undersigned parties hereto, by their counsel, held an informal prehearing conference at the offices of the General Counsel of the Federal Communications Commission on January 16, 1964, at 2:00 p.m. at which time the following stipulations were reached:

A. All parties agree and stipulate that the following issues are presented by the appeal:

(1) Did the Commission err in holding that appellant's pleadings directed against the application for assignment of the permit to construct a new TV station in Yuma, Arizona, (KBLU-TV), were either untimely or insufficient to establish the necessity of a hearing on the question of economic injury inimical to the public interest?

(2) Did the Commission arbitrarily, capriciously and contrary to law, prior precedents and policies, establish new standards for pleading a prima facie case sufficient to require a hearing on the issue of economic injury inimical to the public interest?

(3) Irrespective of the sufficiency of Appellant's pleadings, did the Commission err in failing to institute its own inquiry or

in failing to reconsider its decision, on its own motion, in light of the evidence before it and available to it concerning the likelihood of economic injury inimical to the public interest which would result from the consent to the application for the assignment to intervenor of the permit to construct a new station in Yuma, Arizona?

B. References to the record appearing in the briefs of the parties will be to the page numbers of the record certified to the Court. In the printing of the Joint Appendix there will be set forth, in addition to the consecutive numbering of the pages of the Joint Appendix, the original record page numbers in bold type and indented in a manner which will render it convenient for the Court to locate the pages referred to in the briefs.

Respectfully submitted,
Valley Telecasting Co., Inc.,
Appellant.

by: /s/ Reed Miller

/s/ Thomas G. Fisher
Arnold, Fortas & Porter
1229 - 19th Street, N.W.
Washington, D. C. 20036
Its Attorneys

Federal Communications Commission,
Appellee.

by: /s/ Howard Jay Braun per TGF
Counsel
Federal Communications Commission
Washington, D. C. 20554

Desert Telecasting Co., Inc.
Intervenor

by: /s/ Mark E. Fields per TGF
Washington Building
Washington, D. C. 20005
Its Attorney

Dated: January 21, 1964

Before: Bazelon, Chief Judge,
in Chambers.

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is hereby approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

Dated: January 23, 1964

Form 701

Form Approved
Budget Bureau No. 52-R070.10

United States of America
Federal Communications Commission

APPLICATION FOR ADDITIONAL TIME TO CONSTRUCT RADIO STATION
(Revised 6-16-63)

INSTRUCTIONS

A. This form is to be used in all cases when applying for additional time to construct a radio station. It is to be used only by holders of valid radio station construction permits.

B. Prepare and file three copies if for any class of broadcast service; if for a non-broadcast service prepare and file 2 copies. File with the Federal Communications Commission, Washington 25, D. C. (EXCEPTION: If for a Fixed Public Station in Alaska prepare in triplicate and file with Engineer in Charge, Radio District No. 14, Federal Communications Commission, Seattle, Washington.) In all cases swear to one copy and sign all copies.

C. The name of the applicant must be stated exactly as it appears in the construction permit.

D. This application must be executed by applicant, if an individual; by a partner of applicant, if a partnership; by an officer of applicant, if a corporation or association; or by attorney of applicant only under conditions shown in Section 1.303, Rules Relating to Organization and Practice and Procedure, in which event satisfactory evidence of disability of applicant or his absence from the Continental United States and authority of attorney to act must be submitted with application.

BE SURE ALL NECESSARY INFORMATION IS FURNISHED AND ALL PARAGRAPHS ARE FULLY ANSWERED. IF ANY PORTIONS OF THE APPLICATION ARE NOT APPLICABLE, SPECIFICALLY SO STATE. DEFECTIVE OR INCOMPLETE APPLICATIONS MAY BE RETURNED WITHOUT CONSIDERATION.

1. Have there been any changes in the information heretofore submitted by the applicant in the application for construction permit, any amendment thereto, or modification thereof since filing? Yes ☐ No ☐

If the answer is "Yes" give particulars in the space below:

Agreement has been reached to assign this permit to a corporation, and an appropriate application is being prepared for filing within a week.

Subscribed and sworn to before

on this _____ day of _____, 19____

Notary

(Notary public's seal must be affixed where the law of jurisdiction requires, otherwise state that law does not require seal.)

My commission expires _____

Name of applicant (See instruction C) Robert Hardy Langgill and Robert William Crites d/ba DESERT TELECASTING COMPANY
Post Office address (Number, street, city, state) 1520 4th Ave., Yuma, Ariz.

2. Identity of construction permit for which additional time is requested

File Number <u>BPOT-2979</u>	Location <u>Yuma, Ariz.</u>
Call letters <u>KBLU-TV</u>	Frequency <u>Ch. 13</u>

3. Reasons why construction cannot be completed within the time specified in construction permit (use back of form)

4. If delivery of equipment has not been made, from whom was equipment ordered?

See over

When was equipment ordered?

What was the promised date of delivery, if any?

5. Has the equipment been delivered? Yes ☐ No ☒

If the answer is "Yes" when was installation commenced?

What is the extent of installation?

6. By what estimated date can construction be completed? Sept. 22, 1963

Dated this 15th day of Feb. 1963
Robert Hardy Langgill and Robert William Crites d/ba DESERT TELECASTING COMPANY Applicant (See Instruction C)

By _____

Designate by checkmark below appropriate classification:

- ☐ Individual Applicant
☒ Member of Applicant Partnership
☐ Officer of Applicant Corporation or Association

Notary Public

[R. 3]

The land where the station will be built has been obtained. Proposals for equipment have been obtained, but equipment has not been ordered. We have completed negotiations with CBS for network affiliation. The necessary engineering for microwave has been finished. Upon grant of this application and the assignment application (now being prepared) construction will proceed promptly to completion within the time requested.

[R. 4]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Application of)

Robert Hardy Langill and)

Robert William Crites d/b/a)

Desert Telecasting Company,)

Permittee of Station KBLU-TV,)

Yuma, Arizona)

For additional time to construct)

station)

File No. BMPCT-5826

PETITION TO DENY

Valley Telecasting Co., Inc. (hereinafter "Valley"), licensee of Television Station KIVA, Yuma, Arizona, respectfully petitions that the Commission deny the above-captioned application and that said application be designated for hearing together with the applications of Robert Hardy Langill and Robert William Crites d/b/a Desert Telecasting Company for consent to the voluntary assignment of the KBLU-TV permits and of Robert William Crites t/a Desert Broadcasting Company, for consent to the voluntary assignment of the KBLU-AM license to Desert Telecasting Company, Inc.

1. Simultaneously herewith, Valley is also filing a petition to deny the above assignment applications, for reasons detailed in that pleading which is hereby incorporated by reference. Since the instant application states that construction of the proposed station will proceed only "Upon the grant of this

[R. 5]

application and the assignment application . . .", and since the assignment application cannot be granted without disposing of the issues raised in Valley's petition to deny in that proceeding, no purpose would be served by granting the requested additional time to construct. There is an additional question as to whether construction could be accomplished, in any event, by the September 22, 1963 target date here represented by the applicant as sufficient for its completion.

2. Valley submits that the instant application, conditioned upon the grant of the assignment application, demonstrates that under the present ownership applicant is unwilling and/or unable to proceed with construction contrary to its prior representations to the Commission in its application for a permit to construct. This question of misrepresentation and other matters raised in the companion petition to deny may constitute a bar to the grant of the assignment application, which is, by the applicant's own statement, a condition precedent to construction.

WHEREFORE, the premises considered, it is respectfully requested that the above-captioned application be denied and that it be designated for consolidated hearing with the above-mentioned applications for consent to voluntary assignment on such issues

[R. 6]

as requested in Valley's petition to deny the assignment applications, and on such further and other issues as the Commission may deem just and proper.

Respectfully submitted,
Valley Telecasting Co., Inc.

By: /s/ Reed Miller

/s/ Thomas G. Fisher
Arnold, Fortas & Porter
* * *

Its Attorneys

Dated: April 8, 1963

[Certificate of Service]

[R. 7]

AFFIDAVIT

STATE OF ARIZONA) SS:
COUNTY OF MARICOPA)

I, the undersigned, Bruce Merrill, President of Valley Telecasting Co., Inc., licensee of Television Station KIVA, Yuma, Arizona, being duly sworn on oath, depose and say that I have read the foregoing "Petition to Deny" in re application of Robert Hardy Langill and Robert William Crites d/b as Desert Telecasting Company, permittee of Station KBLU-TV, Yuma, Arizona, for extension of time within which to construct station (BMPCT-5826), that I know the contents thereof, and that the matters and things therein stated or denied are true of my own knowledge, save except those matters therein stated on information and belief, and as to those I believe them to be true.

/s/ Bruce Merrill

[JURAT the 1st day of April, 1963]

[Rec'd-F.C.C.-Apr. 22, 1963]

OPPOSITION TO PETITION TO DENY

The subject Petition to Deny requests that the above-captioned application for extension of completion date be designated for hearing. Such is respectfully opposed upon the following basis:

1. The KIVA Petition fails to allege any economic injury which it will suffer as a result of the extension of completion date. Its allegations of competition are directed to the existence of the construction permit. The time for filing a protest against the original construction permit has long passed. KIVA, accordingly, lacks standing. *Gene T. Dyer*, 20 R.R. 612.

2. The KIVA Petition must be dismissed upon its merits. In the subject Petition, KIVA raises questions which are treated more fully by it in its Petition to Deny applications bearing File Nos. BAPCT-328 and BAL-4738. We have filed a complete response to such questions in our Opposition to such Petition, and a copy of such Opposition is attached hereto and made a part hereof. As is evident from the Attachments, the permittee has proceeded with due diligence since the date of the granting of the construction permit for Station KBLU-TV. In Exhibits E and F to such Opposition, there are described fully the progress made thus far and plans with proceeding promptly with the construction of KBLU-TV. It is evident that complete construction during the term of the original construction permit was not possible because of the decision of Mr. Langill after the original grant to withdraw as a 50% partner from the venture, and the consequent replacement of him in the ownership and financial structure by Mr. and Mrs. Noga. (This matter is presented for the Commission's consideration

[R. 9]

in the pending application for assignment of construction permit (File No. BAPCT-328).

3. For the foregoing reasons, it is submitted that the subject Petition to Deny must be dismissed.

Respectfully submitted,
DESERT TELECASTING COMPANY

By: /s/ Samuel Miller
Attorney

* * *

April 22, 1963

[Certificate of Service]

[R. 10]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re applications of)
Robert Hardy Langill and)
Robert William Crites d/b/a)
Desert Telecasting Company,)
(Assignors))
and)
Desert Telecasting Company, Inc.)
(Assignee))
For Consent to the Voluntary Assign-)
ment of permit which authorized the)
construction of a new television station)
(Station KBLU-TV) in Yuma, Arizona)
Robert William Crites t/a)
Desert Broadcasting Company)
(Assignor))
and)
Desert Telecasting Company, Inc.)
(Assignee))
For Consent to the Voluntary Assign-)
ment of license of Standard Broadcast)
Station KBLU, Yuma, Arizona)

FILE NO. BAPCT-328

FILE NO. BAL-4738

OPPOSITION TO PETITION TO DENY

Desert Telecasting Company (Assignor), Desert Broadcasting
Company (Assignor) and Desert Telecasting Company, Inc. (Assignee)

respectfully submit the following opposition to the Petition of Valley Telecasting Co., Inc. (KIVA)^{1/} to Deny the above-captioned applications:

1. Valley has not made the requisite showing for standing, since it has not made any allegation whatsoever as to how its economic status would be adversely affected by the proposed transfer of either KBLU-AM or KBLU-TV. James R. Meachem, 12 R.R. 1427; National Broadcasting Co., Inc., 19 R.R. 408; Boise Broadcasting Associates, 20 R.R. 1109. It is evident from the allegations contained in Paragraphs 1-9 of the Petition that Valley alleges standing upon the adverse competitive effects of grant of a competing VHF station in Yuma, regardless of who might be the holder of the permit. This is a matter which should have been raised prior to a grant of the construction permit here involved. In Paragraph 3, Valley admits

^{1/} KIVA is the licensee of the only television station in Yuma. It is also affiliated in ownership with the local community antenna system. The instant petition is obviously an attempt to delay the establishment of a competitive signal - this despite representations to the Yuma City Council that KIVA would not hinder the establishment of a competitive TV station in Yuma. (See Ex.

that it knew of the pending application of Desert Telecasting Company for construction permit for KBLU-TV, but for reasons best known to itself, chose not to protest such grant. Its instant Protest against KBLU-TV comes much too late. Insofar as KBLU-AM is concerned, Valley makes no allegation whatsoever as to how it would be injured by the competition resulting from a grant of File No. BAL-4738. Here also, it lacks standing. However, for the Commission's information, the following is submitted in consideration with the economic aspects of the matter.

2. KIVA is affiliated in ownership in the management of the local community antenna system, and considerable time and monies are spent promoting the CATV system. The TV station appears to be subordinated

to such efforts insofar as Yuma is concerned. KIVA does not maintain its main studio in Yuma. It is located in the desert - in fact, in the State of California, some distance from Yuma. KIVA also maintains a studio and staff in El Centro, California. The result has been high advertising rates which are discouraging to the Yuma merchant. The location of the KIVA studio in the desert, miles from Yuma, has also discouraged live presentations by Yuma advertisers, to say nothing of live programs by Yuma organizations.

3. In Paragraph 8, KIVA questions the reliability of Desert's estimate of \$90,000 per year of advertising revenues over KBLU-TV. The experience of Mr. Crites in operating KBLU-AM in the Yuma market was, in part, the basis of such estimate. In the highly competitive AM field, KBLU-AM, operating daytime only, grossed \$79,000, only \$11,000 less than estimated for the full time TV operation. Nor is the economic condition of Yuma as bleak as painted by KIVA. Retail Sales for Yuma County as reported by the Arizona State Tax Commission:

1958	\$66,976,208
1959	68,728,499
1960	69,734,481
1961	74,774,774
1962	79,100,842

Population of Yuma County:

1950 Census	28,006
1960 Census	46,235
Jan. 1, 1963 Est.*	51,000
*Est. by Valley National Bank	

[R. 12]

4. In connection with KIVA's predictions of the dire effects of permitting KBLU-TV to go on the air, including even the suggestion that KBLU-TV may itself have to suspend operations, it is respectfully submitted that such is not consistent with the operation of Mr. Crites in KBLU-AM. Mr. Crites organized, built and has devoted all of his time to this station since 1959. It is the only locally owned radio or television station in Yuma. This close and immediate contact with the Yuma

citizenry plus the integration of the KBLU-AM management and staff has resulted in a station whose operation is geared to the character and needs of the Yuma area. Mr. Crites, owner and manager, has served the community as a member of the Board of the Chamber of Commerce, as Yuma County Chairman of the National Foundation (March of Dimes) for 3 years, as Treasurer of the Republican Central Committee, and in many other capacities. His excellent reputation in the area is attested to in the attached letters from Thomas F. Allt, Mayor of Yuma, and Robert W. Kennerly, a member of the Yuma City Council (Exhibits B and C). Through Mr. Crites, KBLU-TV will bring this same knowledge of the Yuma community and the same energy into a new and competitive television station. The experience of KBLU-AM and its reputation in the community will greatly enhance the future of KBLU-TV. KBLU-TV will provide Yuma and the surrounding area with a locally programmed television station for the first time - and by people who have operated Yuma's only locally owned broadcast service since 1959.

5. Turning to other aspects of the KIVA petition, it is indeed difficult to understand the gravamen of its charges. It has made bald and unsupported charges of trafficking, undisclosed principals and other heinous matters. Its petition is replete with wild-swinging innuendoes. So, it is believed that this opposition can best serve the Commission's purposes if the nature of the transactions involved in the assignment applications is summarized herein. Essentially, the matter is as follows:

6. Mr. Robert Crites, who has been owner and operator of Station KBLU-AM, Yuma, since it went on the air in 1959, formed a 50-50 partnership with Robert Langill known as Desert Telecasting Company and on November 30, 1961, filed application for construction permit for a TV station on VHF Channel 13

in Yuma (File No. BPCT-2979). As shown in said application, Mr. Langill relied in large measure upon loans from others. Both partners provided equal funds for the preparation and prosecution of the application. However, after the grant was made, Mr. Langill began to have misgivings concerning the financial circumstances involved in his borrowing money, and the other responsibilities involved in the prospect of operation. He accordingly expressed a desire to be relieved of his liability in connection with the TV station (see attached Langill affidavit, Exhibit D). Mr. Crites, nonetheless, desired to proceed and took a number of steps looking toward the construction and operation of the station (see attached Crites affidavit, Exhibit E, and Electron Megadyne, Inc., affidavit, Exhibit F). However, in order to fill the financial void left by the proposed withdrawal of his partner, he investigated the possibilities of substituting another party. In the course thereof, Mr. Crites approached Mr. and Mrs. Noga whom he had known for a number of years (see attached Crites affidavit, Exhibit G). The Nogas expressed a definite interest in associating themselves with Mr. Crites, not only in the operation of the television station, but also in KBLU-AM, which is owned and operated by Mr. Crites. As a result of these discussions, agreements were reached whereby the Nogas would become equal owners with Mr. Crites in both the AM and TV operations. Mr. Crites is to receive a total of \$70,000.00 (\$25,000 in cash and \$45,000 in bonds) for the transfer of his 50% interest in KBLU-AM. In reliance of Mr. Crites' excellent stewardship of KBLU, it is understood that he is to continue as general manager of this station. The petitioner herein has made no allegation that Mr. Crites' sale of a 50% interest in KBLU for this consideration constitutes trafficking. This is the sole and complete understanding with respect to KBLU-AM.

7. Now, with respect to KBLU-TV, what is the proposal? First, Mr. Langill is to be reimbursed in the amount of \$860.00 for out-of-pocket expenses. Surely, there can be no problem there. Next, Mr. Crites and the Nogas are contributing equal amounts of cash (\$25,000)

for their respective stock interests. Here again, there is no foundation of any charge that Mr. Crites is receiving a 50% interest in the proposed assignee merely because he holds

[R. 14]

a piece of paper and for no other consideration. The fact that the proposed assignee is to receive additional funds by way of loans from the Nogas, rather than from Crites as well, does not constitute trafficking. It is a normal and frequent business arrangement whereby one principal may advance more funds than another by way of loans. Again, it is submitted, no basis for character assassination exists because of this type of arrangement. Grasping for straws, KIVA attempts to impugn the character of the Nogas because in the application as filed, they relied as an immediate cash resource upon a loan from Mr. John Mathis, a friend and business associate. KIVA apparently cannot understand that a friend and business associate may desire to assist one in a business venture without strings as to ownership or any other obligation. It goes to the length of castigating a mere friendly act, as an act of deception and misrepresentation, and makes such allegations without any factual basis. The attached affidavits of Mr. Mathis (Exhibit H) and Mrs. Noga (Exhibit I) should certainly dispel any doubts on this score. In this connection, it should be noted that on April 4, 1963, Mrs. Noga executed an amendment to the application in which it was noted that the Nogas now have sufficient cash on deposit to finance their venture without recourse to the offer of Mr. Mathis. However, that is still available to them. This amendment was filed on April 8, 1963, which happens to be the same day that KIVA filed its petition, and we do not herein even suggest that KIVA acted in bad faith in not referring to this amendment in its petition. On the other hand, it must be conceded that our amendment executed on April 4 and filed on April 8 was submitted without knowledge of the KIVA petition which was not received by the undersigned counsel until the morning of April 9, 1963. Accordingly, it cannot be contended

that the amendment was tendered for the purpose of curing a "defect" called to our attention in the KIVA petition.

8. Ignoring the fact that Mr. Crites has been an owner-operator of KBLU-AM in Yuma ever since it opened its doors, KIVA attempts to label him as a "trafficker" because of his association with KAPP-FM, Redondo Beach. The applications referred to by KIVA in this connection (paragraph 13 of KIVA petition) have been granted long ago by the Commission. KIVA

[R. 15]

presents no information that was not before the Commission when it considered those applications and found that grants would be in the public interest. However, for the Commission's convenience, there is attached hereto Mr. Crites' affidavit (Exhibit G) summarizing the KAPP situation. It is respectfully submitted that the inferences sought to be drawn by KIVA concerning Mr. Crites' "pattern" of trafficking are not borne out by the history of the KAPP transactions and are in fact refuted by the fact that Mr. Crites has been owner-operator of KBLU-AM since its beginning and still will remain as manager thereof with a 50% ownership interest. It cannot be logically concluded that KIVA has established any "pattern" that is proposed to be followed in the subject applications. Cf. Good Radio, Inc., 23 R.R. 1036.

9. In conclusion, it is respectfully submitted that KIVA lacks the requisite standing to maintain the instant Petition to Deny, and further that on the merits, it has failed to make even a prima facie case upon the unspecified issues upon which KIVA desires that a hearing be held.

Respectfully submitted,

DESERT TELECASTING COMPANY,
DESERT TELECASTING COMPANY, INC.,
and

Robert William Crites t/a
DESERT BROADCASTING COMPANY

* * *

April 22, 1963

By /s/ Samuel Miller
Attorney

[Certificate of Service]

[R. 16]

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[16]

EXHIBIT A

Schumans'

P.O. Box 408

YUMA PIPE & STEEL

1301 Arizona Avenue

Yuma, Arizona

Phone SUset 3-4821

April 16, 1963

To Whom It May Concern:

From 1954 to 1962, I was a member of the Yuma City Council. During this period, the question of KIVA television station, captive T.V. and the future of T.V. in Yuma came up during our meetings.

During our discussions with the attorney for the Valley Telecasting Company for their proposed CATV service, I asked the question, What would be CATV's effect on future television channels serving Yuma?

The attorney, in his answer to my question insisted, Valley Telecasting would not stand in the way nor oppose any new channel for Yuma.

It was our opinion in all cases, not to interfere or injure the future growth of television in Yuma, nor unduly meddle in their business.

It is my impression, that most of Yuma County people are in favor of two free television channels, as authorized by the Federal Communications Commission.

Very truly yours,

/s/ Richard H. Schuman

[R. 17]

EXHIBIT B

THOMAS F. ALLT
Mayor

CITY OF YUMA
ARIZONA
City with a Future

April 16,
1963

Federal Communications Commission
Washington, D. C.

Gentlemen:

In the very near future your honorable Commission will undoubtedly be in receipt of objections raised to an application for TV Channel 13 in Yuma for Mr. Robert Crites.

This gentleman has owned and operated KBLU Radio Station in this community for the past several years and has proven and been most successful in this undertaking and a real credit to our city.

Mr. Crites' efforts to utilize the facilities of Radio Station KBLU as a public service are beyond reproach and well deserving of thanks and appreciation from this community. We, of the City of Yuma and surrounding areas, wish to heartily commend Mr. Crites for his outstanding services to the people of this community and sincerely trust that he will have been afforded the opportunity to operate on the assigned Channel 13.

On the basis of his ability as a businessman and public servant we hope your Commission will see fit to approve the application of Mr. Crites and extend to him the opportunity to compete as a free, individual enterprise.

Thanking you in advance for any consideration or courtesy extended this man, I am

Respectfully yours,

/s/ Thomas F. Allt
Mayor of the City of
Yuma, Arizona

TFA:eg

[R. 18]

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[R. 18]

EXHIBIT C

Office of the
CITY COUNCIL

CITY OF YUMA
ARIZONA

April 16, 1963

Federal Communications Commission
Washington, D. C.

Gentlemen:

Pursuant to the application for Channel 13 Television in Yuma, Arizona by Robert Crites and the subsequent petitions of denial by KIVA, I wish to submit the following pertinent points for your consideration:

Mr. Crites, who has operated Radio Station KBLU in Yuma for the past four years, is, I feel, a most substantial businessman and a very desirable citizen. His efforts to operate his radio station in the public interests and on a high plane are readily accepted in Yuma.

It would seem to me a grave injustice to deny a person of his caliber, the privilege and right to further his already successful business in our community by the establishment of an additional cost free television station in Yuma.

I therefore respectfully request that you disallow the petitions of denial which have been or may still be submitted to you in regard to his application.

Sincerely,

/s/ Robert W. Kennerly
Councilman
City of Yuma, Arizona

RWK:eg

[R. 19]

EXHIBIT DAFFIDAVIT

CITY OF ARIZONA)
COUNTY OF YUMA) SS:

I wish to assure the Commission that when Mr. Robert William Crites and I made application for Channel 13 in Yuma, Arizona, it was my intention to be an active working partner in the station. As our application (BPCT-2979) shows, I had at my disposal adequate funds to insure my portion of the financial needs of the television station. After our construction permit was granted, and I was faced with the prospect of the actual operation, and the management responsibility, I realized that I was not emotionally prepared for these added burdens. I felt that I would not be able to devote the proper amount of time, concern, and responsibility that this participation demanded. I was forced by these conclusions to inform my partner, Robert William Crites, that I was not willing to proceed as I had previously promised. My decision, I told him, was the only honest one I could make, and that it was far better than getting into something that we would both regret later.

Crites immediately replied that he still wanted to proceed with the station, and that he would seek an investor or investors to take my place. I agreed to this.

At no time did I lack the financial backing to take a full part in the operation as originally proposed in our application.

/s/ Robert Hardy Langill

[JURAT the 16th day of April, 1963]

EXHIBIT EAFFIDAVIT CONCERNING EFFORTS TO ACT ON
CONSTRUCTION PERMIT FOR KBLU-TV FROM
DATE OF GRANT

Page 1

STATE OF ARIZONA)
COUNTY OF YUMA) SS:

The Federal Communications Commission on July 23, 1962 granted a construction permit on Ch. 13 in Yuma, Arizona to Desert Telecasting Company, a partnership. As one of the two equal partners, within thirty (30) days of the grant, I did the following things:

1. Worked out terms of a lease with our present landlord for the KBLU Radio office and studio building, for an additional building at the same location to house the television studios and control rooms. This lease has remained unsigned to this date, awaiting approval of the application for consent to transfer of the television permit, so that the new principals could appear on the lease. The terms will remain the same.
2. Contacted CBS-TV Network in New York, expressing our desire to become one of their affiliated stations.

Within 60 days of the above mentioned grant, I employed Edward E. Benham, of Van Nuys, California, to be consulting engineer for the TV station. Immediately after our first meeting we contacted the major equipment suppliers, asking for proposals and listing our requirements. During November, 1962, the first proposals were received. Since that time we have been in constant contact with the suppliers, in Los Angeles and during their trips to Yuma. These discussions culminated in actual inspections of the equipment at the National Association of Broadcaster's convention in Chicago. From this inspection, and more first-hand meetings in Chicago with the suppliers and their engineers, we were able to reach a decision.

[R. 21]

Affidavit Concerning Efforts to Act on Construction Permit
For KBLU-TV from Date of Grant

Page 2

On April 10, 1963, I gave Mr. Bruce Rozet, Vice President of Electra Megadyne, Inc., a confirmation of our order for a complete equipment package.

On August 2, 1962, I wrote Mr. Bruce Merrill, who in addition to being the President of Valley Telecasting Co., Inc., also operates the Antennavision Company, which provides microwave relay service for television signals between Phoenix and Yuma. I told him of our desire to bring the network signal of a Phoenix station to Yuma on his service, and asked what the costs would be. His reply dated Nov. 21 of \$3,000.00 per month proved to be uneconomical for us.

On October 28, 1962, our consulting engineer, Edward Benham took special equipment to the top of the Gila Mountains, east of Yuma, where he measured a good signal from KOOL-TV, Phoenix, and at the same time determined that this would make an ideal off-the-air pick-up point for us. Subsequently, we applied for this Relay Station, and the application is on file.

Also in October, 1962, we arranged with Film Services, Corp. of Salt Lake City, to act for us in the purchase of television films. In addition, during that month we contacted the major film distributors, asking for information on their products, and many of them made trips to see us here in Yuma.

In February, 1963, I flew to New York to conclude our arrangements with CBS-TV. We signed an affiliation agreement with them on Feb. 15, 1963, and KIVA was notified at that time that effective August 14, 1963, KBLU-TV would be the CBS affiliate for Yuma.

[R. 22]

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[R. 22]

Affidavit Concerning Efforts to Act on Construction Permit
For KBLU-TV from Date of Grant

Page 3

On April 2, 1963, I contracted with Yuma Two Way Radio Service, a Yuma firm, to construct and erect a building and towers atop the Gila Mountains for our off-air pickup of KOOL-TV.

Our plans were all aimed at an on-air date sometime in July, 1963. Electra Megadyne assured us that equipment could be delivered in time for that plan. CBS-TV was prepared to clear most of their programs for broadcast at that time, with the balance to be switched from KIVA to our station in August. The plans for the new building have been completed so that the landlord could assure us that he too could comply with our timetable.

The unexpected opposition from our future competitor, Valley Telecasting, threatens our plans and obviously could cause us great inconvenience and economic loss.

/s/ Robt. William Crites

[JURAT the 16th day of April, 1963]

[R. 23]

EXHIBIT F

AFFIDAVIT

State of California)
County of Los Angeles) ss

Affiant Bruce Rozet avers that he is the Vice President of Electra Megadyne Inc., a California corporation; that he has examined the records prepared by sales personnel of said corporation in the ordinary course of business and maintained by said corporation; that said records indicate that Mr. Max Ellison of said corporation had a conference with a Mr. Ed Benham, consulting engineer for Desert Telecasting Corp., owner of Station KBLU of Yuma, Arizona on October 8, 1962, which conference was held in Los Angeles, California; that at said conference Mr. Benham discussed the telecasting needs of said Station and the ability of Electra Megadyne Inc. to fulfill said needs.

Said records further show that the said Mr. Max Ellison had a further meeting with Mr. Robert Crites of said Station on October 22, 1962 in Yuma, Arizona for the purpose of further discussing the needs of said Station and the ability of Electra Megadyne Inc. to fill said needs.

Said records further show that a proposal was made by Electra Megadyne Inc. to Desert Telecasting Corp., for furnishing telecasting equipment to said Station, on or about November 5, 1962. On or about April 10, 1963 affiant met with the said Robert Crites who stated to affiant that he had decided to accept the last proposal submitted by Electra Megadyne Inc., and stated that he desired to commence telecasting operations early in July 1963.

/s/ Bruce Rozet

[JURAT the 19th day of April, 1963]

[R. 24]

24

[R. 24]

EXHIBIT G

AFFIDAVIT

STATE OF ARIZONA)
COUNTY OF YUMA) SS:

None of the transactions concerning station KAPP, Redondo Beach, California, with which I was associated, were planned or requested looking toward a profit, and could not be called "trafficking" in any sense. My original partner, Sherman Somers, was unable to continue with the venture, and was replaced by a resident of the area in which the station was to be constructed, George Gillum. My residence and prime responsibility with KBLU Radio Station in Yuma, Arizona, made it difficult for us to function as an equal team in the operation of KAPP. The losses soon proved to be a drain on me. Mr. Gillum and I agreed that if he were to hold complete ownership and control, he could function better, and could create a profitable operation. To help make this transfer possible to Mr. Gillum, and to consolidate my activities in Yuma, I was willing to sell my interest in KAPP at a loss.

In the case of the construction permit for KBLU-TV, Yuma, Arizona, I have continually had access to the funds outlined in the original application, BPCT-2979. The unwillingness of my partner, Mr. Langill, to proceed with construction, led me to seek a new partner. Mr. and Mrs. John Noga will be excellent principals in the proposed operation. I have known them for over six years. Mr. Johnny Mathis, who was willing to loan funds to the Nogas, cannot in any sense be considered as an owner or principal in the proposed operation. This was never contemplated or implied by anyone concerned with the transfer.

/s/ Robt. William Crites

[JURAT the 16th day of April, 1963]

[R. 25]

EXHIBIT HAFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

JOHN R. MATHIS, being duly sworn, deposes and says:

I am a recording artist and an entertainer. My manager is Helen Noga.

I have entered into business ventures with Helen Noga in the past including Mano Realty Company, which is a real estate co-partnership, and Cathryl Music Corp., Amano Music Corp., Nomat Music Corp. and Elm Drive Music Corp. which are music publishing corporations. I own half of the stock of each of the aforesaid corporations and Helen Noga owns the other half. Similarly, I am a 50% partner in Mano Realty Co., and Helen Noga is the other 50% partner. I have also entered into ventures on my own and Helen Noga has entered into ventures on her own.

Helen Noga advised me that she and her husband John Noga desired to purchase a one-half interest in Desert Broadcasting Co., which company owns a radio station known as KBLU in Yuma, Arizona, and has a permit to construct a TV station in Yuma, Arizona. I advised her that I had no interest in personally entering into this venture and wished Mrs. Noga and her husband the best of luck if they desired to enter into this venture with their own funds.

I have absolutely no personal financial interest in Desert Telecasting Co. or in Helen Noga's interest in same. I offered to lend Mrs. Noga monies in connection therewith as an act of friendship with no strings attached. As things turned out, it was not necessary for me to lend Mrs. Noga any money in order for her to have the necessary funds to enter into this venture.

/s/ John R. Mathis

[JURAT the 19th day of April, 1963]

[R. 26]

EXHIBIT I

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

HELEN NOGA, being duly sworn, deposes and says:

My husband, John Noga and I are purchasing 50% of the capital stock of Desert Broadcasting Company as our own private investment.

We are using our own money for this purpose. When we originally filed the application we showed the proposed loan from Johnny Mathis as a convenience. There was no understanding with him as to any personal ownership by him in the Station, but was merely a personal favor to us with no other commitment involved on our part to him. Since the original filing, we reexamined our cash position and saw that we could finance our commitment to Desert Broadcasting Company without a loan from Johnny Mathis and accordingly have filed an amendment to the application reflecting the availability of our own funds without reference to any loans.

We have known Robert Crites for approximately eight years, and have been closely acquainted with his career ever since he was employed by Columbia Records in the Boston area. We are also convinced of his integrity.

We are entering into this venture because we have faith that Robert Crites is very well acquainted with both the radio and TV broadcasting business and that the Yuma area is growing and can use a second TV station and that this venture can be very profitable in the long run.

/s/ Helen Noga

[JURAT the 19th day of April, 1963]

[R. 27]

[Rec'd -F.C.C.- May 2, 1963]

REPLY TO OPPOSITION TO
PETITION TO DENY

[BMPCT-5826]

Valley Telecasting Co., Inc., petitioner in the above-captioned matter (hereinafter "Valley"), files the following reply to the Opposition of Desert Broadcasting Company, Desert Telecasting Company and Desert Telecasting Company, Inc., (hereinafter "Desert") to Valley's petition to deny:

1. As pointed out in Valley's petition, construction of Desert's KBLU-TV is conditioned upon the grant of the pending applications for assignment of permit and license to Desert Telecasting Company, Inc. (File Nos. BAPCT-328, BAL-4738). In its Petition to Deny those applications, and in its Reply to Opposition to Petition to Deny filed in that proceeding, Valley has set forth with requisite particularity its standing to protest the assignment applications. Similarly, it has standing to protest the instant application which is conditioned upon the assignment applications.

[R. 28]

2. Furthermore, Section 1.323(a) of the Commission's Rules and Regulations requires that an applicant for extension of construction permit make "a specific and detailed showing that the failure to complete [construction] was due to causes not under the control of the grantee" or must show "other matters sufficient to justify the extension." Desert has alleged no causes outside of its control. The reason is obvious: it could not jeopardize its permittee status by admitting that it lacked the necessary funds for construction. Its only reason for the requested extension is that it does not wish to build under the present ownership. This is not only insufficient to justify the extension, but raises a serious

question of Desert's diligence in its efforts to complete construction. Moreover, Desert's inactivity in construction as well as the past activity of Desert's principal, Mr. Crites, raise other grave questions reflecting adversely on the permittee. Details of these matters, which are discussed in Valley's pleadings in the assignment application proceedings referred to above, are incorporated herein by reference. These are important questions which, regardless of Valley's standing, should be considered by the Commission sua sponte as matters directly affecting the public interest. Cf. Examiner's Initial Decision in Desert Broadcasting

[R. 29]

Company, Inc., Docket Nos. 14714 and 14715, released April 29, 1963, FCC 63D-49, Mimeo. No. 34707.

WHEREFORE, the premises considered, a hearing should be ordered as requested on the above-captioned application.

Respectfully submitted,

Valley Telecasting Co., Inc.

By: /s/ Reed Miller

/s/ Thomas G. Fisher

Arnold, Fortas & Porter * * *

Its Attorneys

Dated: May 2, 1963

[Certificate of Service]

[R. 62]

[R. 159] [R. 485]

MEMORANDUM OPINION AND ORDER
[BMPCT-5826; BAPCT-328; BAL-4738]

B
FCC 63-785
39063

By the Commission: Commissioners Hyde, Bartley, Lee, Ford, Cox
and Loevinger absent.

1. The Commission has before it (1) the above-captioned applications; (2) a petition to deny the above-captioned assignment applications filed on April 6, 1963, by Valley Telecasting Co., Inc., licensee of Station KIVA, Yuma, Arizona, and responsive pleadings thereto; (3) a petition to deny the application for extension of time in which to construct filed also by Valley Telecasting Co., Inc., and responsive pleadings thereto; and (4) a motion filed on May 9, 1963, by Valley Telecasting Co., Inc., to designate for a consolidated hearing the aforementioned applications and applications filed by KXO-TV, Inc., and Tele-Broadcasters of California, Inc., for construction permits for new television stations in El Centro, California (BPCT-3100; BPCT-3079).^{1/}

^{1/} This motion is now moot in view of the dismissal of the petitions to reconsider the grant of the construction permits. KXO-TV, Inc., FCC 63-759, released August 1, 1963.

[R. 63]

[R. 160] [R. 486]

2. The petition to deny the assignment application alleges that Yuma cannot support another television station and that a hearing is required in view of the holding in Carroll Broadcasting Company v. FCC, 258 F.2d 440, 17 Pike & Fischer RR 2066 (1958), that there are questions concerning the character qualifications of the proposed assignee because of a possible misrepresentation of intention and ability to construct at the time the construction permit for Station KBLU-TV was granted, and there are possible hidden interests. In a joint opposition to the petition, applicants alleged that petitioner did not have standing; that petitioner had not made a proper showing for a hearing

on a Carroll issue; that applicants were able and willing to construct at the time of the grant of the construction permit, but that subsequent events required the permittee to seek new capital; and that there were no hidden interests. In a reply to the opposition, petitioner reiterated some of the original allegations and raised additional questions about programming.

3. In the petition to deny the application for an extension of time in which to construct, petitioner incorporates by reference the allegations it made concerning the assignment applications and further alleges that since the extension application states that construction will commence "Upon the grant of this application and the assignment application. . .", the present permittee is unwilling and/or unable to construct the station. In an opposition to the petition to deny the extension application, the permittee incorporates the allegations it made in its opposition to the petition to deny the assignment applications, and alleges that since the time for filing a protest against the original construction permit has long passed, petitioner lacks standing; that the permittee has taken certain specified steps toward construction and operation; and that complete construction during the term of the original construction permit was not possible because of the decision of Mr. Langill after the original grant to withdraw as a 50% partner from the venture, and the consequent replacement of him in the ownership and financial structure by Mr. and Mrs. Noga.

4. The petitioner has demonstrated standing as a party in interest with respect to the assignment applications, but standing does not lie against applications for extension of time in which to construct. The language of Section 309 of the Communications Act of 1934, as amended, provides that a petition to deny does not lie against an extension application. Section 309(d)(1) provides that petitions to deny may be filed against any application to which Section 309(b) applies; Section 309(c)(2)(C) specifically provides that Section 309(b) shall not be applied to applications for extension of time to complete construction of authorized facilities. The arguments advanced in the petition to deny the

extension application will, however, be treated in the disposition of the petition to deny the assignment applications. Petitioner's allegation that the construction of Station KBLU-TV will result in the loss of network affiliation and will endanger limited advertising revenues, demonstrates that construction of said

[R. 161] [R. 64] [R. 487]

station is likely to affect the economic interests of petitioner. The permittee's failure to demonstrate financial ability to construct without the proposed assignment, and statements made by the permittee for KBLU-TV that construction will commence upon the grant of the assignment application, that the lease for the transmitter site is contingent on a proposed assignment, and that construction has been delayed by the withdrawal of Mr. Langill indicate that a grant of the assignment applications will increase the likelihood of early construction of Station KBLU-TV, and that, therefore, petitioner is a party in interest with regard to the assignment applications. Atlantic Coast Broadcasting Corp. of Charleston, 22 Pike & Fischer RR 1045 (1962); Camden Radio, Inc. v. FCC, 200 F.2d 191, 10 Pike & Fischer RR 2072 (1954). The only basis for petitioner's standing as a party in interest with regard to the assignment application for radio station KBLU derives from the fact that the contract of sale is subject to the assignment of both the license of the AM station and the TV construction permit.

5. On July 23, 1962, the Commission granted the original construction permit for Station KBLU-TV. No party filed a petition to deny the original construction permit nor was a petition for reconsideration of the grant filed. Petitioner now claims that it did not protest the grant of the original construction permit because it believed at that time that the permittee was incapable of construction and operating a station, so that therefore, instead of protesting a grant to a permittee which petitioner believed was financially unqualified, petitioner now protests the assignment of the permit to an assignee which petitioner

believes has stronger financial qualifications. This belated concern could be justified if petitioner could present specific allegations of fact based on material not available at the time of the grant of the construction permit to show that the economic situation in the Yuma area raises substantial questions about the ability of the area to support an additional station without a deterioration of service contrary to the public interest, so as to require a hearing of the type ordered in Carroll Broadcasting Company v. FCC, 258 F.2d 440, 17 Pike & Fischer RR 2066 (1958). Petitioner has introduced no such newly available material. It admits that there were increases in population and retail sales in the Yuma area and improved net earnings for Station KIVA(TV) in 1962, all of which factors would indicate that Yuma is more capable of supporting two stations at the present time than it was in July, 1962. The only new factor raised by petitioner which might be detrimental to operation in Yuma, stems from the grant of two construction permits for new television stations in El Centro, California, on April 10, 1963. Petitioner first mentioned the El Centro grants in the aforementioned motion to designate the Yuma and El Centro applications for a consolidated hearing, which motion was filed on May 9, 1963, more than 30 days from the March 8, 1963 public notice of the acceptance of the filing of the Yuma assignment applications. Even if we ignore the question of the timeliness of petitioner's initial allegation of the effect of the El Centro grants, we find that petitioner has not demonstrated that these grants would be a new factor which would warrant a hearing on the question of the ability of Yuma to support two television

[R. 162] [R. 65] [R. 488]

stations without a net degradation of service. A mere recitation that construction permits have been granted for new facilities to serve an area, part of which is in the service area of two previously authorized facilities is insufficient to warrant a Carroll hearing on an application for an assignment of one of said previously existing facilities. Normally,

the proper time to raise Carroll issues arising from the grant of construction permits for new facilities is at the time of Commission consideration of the application for said construction permits. This Commission has already denied the petitions filed by KIVA to reconsider the grants of the two El Centro construction permits KXO-TV, Inc., FCC 63-759, released, August 1, 1963. In that decision we considered the aforementioned motion to designate the El Centro and Yuma applications for a consolidated hearing, and we determined that petitioner had not made a showing that Yuma and El Centro are in fact one market nor that the Yuma and El Centro stations depended on substantial common sources of revenue or of program material so as to prevent the operation of the stations in the public interest.

6. Even considering the allegations based on information available at the time of the original grant of the KBLU-TV construction permit in addition to the presence of the new El Centro facilities, petitioner falls short of making a prima facie showing under Section 309(d) of the Communications Act that a grant of the assignment applications would be inconsistent with the public interest because of Carroll issues. Petitioner alleges that Station KIVA operated at a loss prior to 1960, but admits that the station has made a profit in the past three years, with its best year in 1962. It alleges that the operation of KBLU-TV will deprive KIVA of its CBS affiliation, but it admits that the loss of CBS network revenue can be at least partially restored by revenues for other network or non-network programming. It alleges that the estimated gross revenues (\$90,000) for KBLU-TV are unrealistic, but does not give a satisfactory basis for this conclusion in view of the volume of retail sales in the area and the past gross revenues of the AM station KBLU (\$79,000 in 1962). Petitioner has given no specific information on total advertising revenue potentially available to the Yuma stations, nor has it alleged that any specific advertising revenue would be irreplaceably lost, cf. the decision of the Review Board in Tree Broadcasting Co., FCC 63-673, released, July 23, 1963. Furthermore, petitioner has made an insufficient showing that any loss of revenue it might sustain

will lead to a loss or degradation of program service in the area. Its conclusion that the operation of KBLU-TV would drive KIVA off the air, and that the smaller service area and managerial inexperience of KBLU-TV would ultimately cause that station's financial ruin is highly speculative. Its allegations about over-commercialization and excessive network programming by KBLU-TV are no more substantial, and will be discussed below.

[R. 163] [R. 66] [R. 489]

7. The questions which petitioner raises concerning the assignment itself are more timely, but they are not supported by affidavits from persons with personal knowledge of specific facts to prove the conclusionary allegations. The petition raises questions about (1) the possibility that at the time the original construction permit was granted, the permittee was unwilling and/or unable to construct; (2) whether Commission policy will allow an extension of time in which to construct when it appears that additional financing is required through a proposed assignment of the construction permit; (3) whether there were hidden interests; and (4) whether the proposed programming is in the public interest.

8. To sustain the allegation that the permittee for Station KBLU-TV was unwilling and/or unable to construct at the time of the grant of the permit, petitioner has been able to adduce only the statement by assignor that within 30 days of the grant the permittee entered into a lease arrangement which contemplated a transfer of the construction permit; the allegation that the permittee had undertaken no actual construction; and the statement from Mr. Langill that he is now unwilling to participate in the operation of the station. Opposed to these allegations the applicants have presented a sworn statement from Mr. Langill that when he and Mr. Crites filed the application for the construction permit they had adequate funds at their disposal and he had intended to be a working partner, but that after the permit had been granted he realized that he

was not willing to participate in the venture. Applicants have also presented a sworn statement from Mr. Crites that he took specified steps toward securing a lease for the studio, obtaining network affiliation, purchasing broadcast equipment, arranging for the pickup of network programming, and negotiating for the purchase of television films, all with the obvious purpose of placing the station in operation. Petitioner's speculative conclusions unsupported by specific allegations of fact by a person or persons with personal knowledge thereof are countered by the above sworn statements of the applicants. Therefore petitioner's showing is insufficient under the requirements of Section 309(d)(1) of the Communications Act. cf. Radio South, Inc., 21 Pike & Fischer RR 547 (1961).

9. Absent any specific allegations of fact to support the conclusion that the permittee for Station KBLU-TV was unwilling and unable to construct the station at the time the permit was granted, petitioner's objections to the application for extension of time in which to construct are not well founded. In the instant case, the permittee stated that it needed additional financing after one of the two partners made in good faith a decision to withdraw subsequent to the grant of the construction permit. The permittee now proposes to provide the desired additional financing by the assignment proposed in the co-pending application. The Commission, following the policy it has employed in many past cases, will not now question the

[R. 164][R. 67][R. 490]

financial ability of the permittee, on the assumption the proposed assignment will not be granted, as long as there is a reasonable possibility of a grant of the co-pending assignment application to a financially qualified assignee and it is satisfied that the permittee has proceeded with due diligence toward construction and operation under the given circumstances. In the instant application the permittee has stated that it took certain specified steps toward the operation of the station. This case is distinguishable from the situation presented in the case of Plains Radio Broadcasting

Co., 23 Pike & Fischer RR 221 (1962), when the Commission denied applications for extension of time in which to construct and for assignment of construction permits by a permittee who had been shown to have had no intent to construct at the time the permits were granted, who had taken no steps toward the operation of the stations, and who had attempted to recoup more than out-of-pocket expenses in the sale of the construction permits. We conclude that permittee has exercised proper diligence toward construction, under the circumstances.

10. The allegation that there were hidden interests in the assignee is based on sheer speculation. The only fact adduced to support this conclusion was an offer from John Mathis to loan capital, which appeared in the original application.

11. In its Reply to the Opposition to Petition to Deny petitioner for the first time raises issues concerning the proposed programming of assignee on Station KBLU-TV. Absent a showing that these allegations were based on substantial information not previously available for good cause, new allegations raised in a Reply to an Opposition are untimely if the reply was filed more than 30 days after the public notice of the acceptance of the application, cf. O. R. Mitchell Motors, 13 Pike & Fischer RR 1300 (1956). Petitioner's reply was filed on May 2, 1963, over 30 days from the notice of acceptance of the application, and the allegation relies on information which a representative of petitioner alleges he discovered on February 13, 1963, and on proposed programming percentages which were filed with the application.

12. Apart from the fact that the request for issues on these points was untimely filed the Commission finds that, on the merits, the allegations are insufficient to warrant a hearing. Petitioner's allegation that assignee had undertaken to broadcast all CBS programs is based on hearsay and is not supported by an affidavit of a person or persons with personal knowledge of assignee's plans to broadcast network programming.

To support this allegation petitioner submitted only an affidavit from Leavenworth Wheeler who stated that in a telephone conversation of February 13, 1963, Mr. Don Clancy of CBS told Mr. Wheeler that Mr. Crites had agreed to clear the entire CBS network schedule. Therefore, petitioner's conclusion that assignee's proposed programming percentages of 11.7% live programming and 58.7% network programming amounted to misrepresentations to the Commission, because Station KBLU-TV could not carry all CBS programming in its 58 1/3 hours of proposed programming and fulfill the aforementioned percentages, is based on speculation on assignee's programming plans.

13. Petitioner also alleges that the proposed program schedule raises a question of over-commercialization, since the assignee proposes to broadcast 700 commercial spot announcements in its proposed 38 1/2 hours of commercial time, which would require an average of over 16 commercial spots per hour during each hour of commercial time. However, the proposed number of commercial spot announcements provides for an average of 12.0 for the entire proposed broadcasting week, and the assignee has represented that it will broadcast no more than 3 commercial spots with a maximum duration of 1 minute each during any 14 1/2 minute period. The Commission has not up to this time adopted fixed standards setting permissible limits on commercial announcements. A rulemaking proceeding (Docket No. 15083) in which this subject is being considered is now pending. KBLU-TV will be required to comply with any rule adopted on this matter. Meanwhile, however, there is no sufficient basis upon which to rest petitioner's assertion that excessive commercialization is proposed.

Accordingly, IT IS ORDERED That the petitions of Valley Telecasting Co., Inc., to deny the applications for extension of time in which to construct Station KBLU-TV, for the assignment of license of Station KBLU, and for the assignment of the construction permit for Station KBLU-TV ARE DENIED, and the above-entitled applications ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Adopted: August 9, 1963
Released: August 9, 1963

/s/ Ben F. Waple
Secretary

MEMORANDUM OPINION AND ORDER
[BMPCT-5826; BAPCT-328; BAL-4738]

B
FCC 63-1126
44114

By the Commission: Commissioner Hyde absent; Commissioner Ford not participating; Commissioner Cox dissenting and voting to grant the petition.

1. The Commission has before it (a) the above-captioned applications; (b) a petition filed on September 9, 1963, by Valley Telecasting Co., seeking reconsideration of the Commission's action of August 9 granting applications for the assignment of Stations KBLU and KBLU-TV and for extension of time in which to construct KBLU-TV; (c) an opposition to this petition filed on September 23, 1963, by Desert

[R. 388][R. 71][R. 712]

Telecasting Company, Inc.; and (d) a reply to the opposition filed on October 1, by Valley.^{1/}

2. Petitioner urges that the allegations in its petition to deny these applications were sufficient to justify a hearing on the ability of the community to support an additional station in the public interest under the decision in Carroll Broadcasting Company v. FCC, 258 F.2d 440, 17 Pike and Fischer RR 2066 (1958); that a preliminary, but detailed, expert economic analysis of the Yuma and El Centro area, attached to the petition for re-consideration, establishes the validity of petitioner's Carroll allegation; that the public interest required a Carroll hearing on the Commission's own motion, irrespective of Valley's rights; and that the Commission's grant of the applications was in violation of its policy and rules with regard to trafficking, misrepresentations, lack of diligence for construction, showing required for extension of construction time, waiver of the "three-year" rule (Section 1.365 of the Commission's Rules), and programming requirements.

3. The opposition to the petition alleges that petitioner has not made a sufficient showing to warrant a Carroll hearing; that the timing

of the various petitions filed by Valley in this matter amounts to an abuse of Commission processes; that Valley slept on its rights and forfeited the opportunity to submit the new material which it is now offering; that the extension of time in which to construct was consistent with Section 319(b) of the Communications Act and Section 1.323 of the Commission's Rules; that the conduct of the applicants did not constitute trafficking; and that petitioner had not made a showing that the proposed programming of Desert was contrary to Commission policy.

4. As we stated in the Memorandum Opinion and Order dismissing petitioner's petition to deny these applications, petitioner has demonstrated that it is a party in interest with regard to the assignment applications, Desert Telecasting, 1 Pike & Fischer RR 2d 132 (1963). Petitioner has a similar standing with respect to the extension application against which a petition for reconsideration filed under Section 405 of the Communications Act can lie.

^{1/} The Commission also has before it a Motion to Stay construction of KBLU-TV filed by Valley on September 13, and pleadings responsive thereto. This motion is moot in view of the disposition of the petition for reconsideration.

[R. 389] [R. 72] [R. 713]

5. The sequence of applications filed for television facilities in Yuma and El Centro shows that petitioner did not avail itself of a timely opportunity to raise the Carroll allegations which it now presents. On October 31, 1961, New England Industries filed an application for a new television station in Yuma; on November 30, 1961, Robert Hardy Langill and Robert Crites, d/b as Desert Telecasting Company, filed an application for a new television station which was mutually exclusive with the application filed by New England Industries; on December 5, 1961, Valley filed a petition to deny the New England application and requested a hearing on the Carroll issue; on January 30, 1962, Valley withdrew its petition to deny; on May 31, 1962 New England Industries withdrew its application; on July 23, 1962,

construction permit for Station KBLU-TV to Robert Hardy Langill and Robert Crites; on July 25, 1962, we amended Section 3.606 of the Rules to allocate Channels 7 and 9 to El Centro, which previously had no VHF channel; on July 25, 1962, Tele-Broadcasters of California, Inc., filed an application for a new television station on Channel 7 in El Centro; on September 18, 1962, KXO-TV, Inc. also filed an application for Channel 7 in El Centro; on November 5, 1962 Tele-Broadcasters amended its application to seek Channel 9; on March 8, 1963, the Commission accepted for filing the application for the assignment of the construction permit for KBLU-TV to Desert Telecasting Company, Inc. (owned 50% by Mr. Crites and 50% by John and Helen Noga); on March 15, 1963, Valley's license for Station KIVA was renewed; on April 8, 1963, Valley filed a petition to deny the KBLU-TV assignment application; on April 10, 1963, we granted the two applications for new stations in El Centro; on May 9, 1963 Valley filed a petition to reconsider the grants of the El Centro construction permits; on July 30, 1963, we denied the petition to reconsider the El Centro grants; and on August 9, 1963, we granted the application for the assignment of Station KBLU-TV.

6. In the first place petitioner failed to file a petition against the original grant of the construction permit for KBLU-TV. As we said when we granted the assignment of KBLU-TV, petitioner's explanation that it did not think that the permittee would construct the station did not justify its failure to raise its alleged public interest issues at the time of the grant of the construction permit. The Carroll issue cannot be appropriately directed to an assignment application when the petitioner alleges public interest issues which arose from the impact of the original construction permit for the station and not from the assignment application attacked by the petitioner. For similar reasons, petitioner is not entitled to a hearing on an application for extension of time in which to construct based on allegations of injury to the public interest which arose from the impact of the original grant of the construction permit. cf. Mass Communicators, Inc. v. FCC, 266 F.2d 681, 18 Pike & Fischer RR 2098 (1959).

The additional allegations in the petition to deny and the petition for reconsideration mention only one development which petitioner says indicates that Yuma, Arizona is now less able to support two television stations than it was on July 23, 1962, when the construction permit for Station KBLU-TV was originally granted. That development is the grant of two construction permits for new stations in El Centro, California, which propose service areas which would overlap with the Yuma stations. The proper time to question the effect of those new stations on the operation of petitioner's Yuma station was at the time of the consideration of those new construction permits. The petitioner, having failed to do so, did belatedly file a petition for reconsideration of those grants, which alleged that the Yuma and El Centro areas could not support four stations in the public interest. The Commission dismissed the petition for reconsideration of the El Centro grants stating that that petitioner had not properly explained its failure to raise the issues in a petition to deny those applications, and that the allegations did not raise substantial questions concerning the Commission's independent determination that the Yuma and El Centro areas could support the four television stations, KXO-TV, Inc., 1 Pike & Fischer, RR 2d 125 (1963).

7. Petitioner's allegations in its Petition for Reconsideration in support of a hearing on the Carroll issue are essentially the same as in its Petition to Deny, but it has now additionally submitted an economic survey and engineering studies. Even in a case where extraordinary circumstances could be urged as warranting a Carroll challenge of an assignment of license, adequate support for Petitioner's contentions would have to be submitted in timely fashion - i.e., prior to grant of consent to the assignment. Petitioner's contention that it thought its pleadings in the Petition to Deny were adequate does not justify the withholding of certain allegations on ultimate facts until the Petition for Reconsideration. In other cases we have said that we would not accept as adequate for compliance with Section 1.84 of the Commission's Rules an explanation that a petitioner seeking reconsideration of

a grant did not think that we would make the grant based on the information we had before us. cf. Millers River Translators, Inc., 25 Pike & Fischer, RR 516 (1963); Forward Television, Inc., 1 Pike & Fischer, RR 2d 300 (1963).

8. We find the present situation analogous to that presented to the court in Colorado Radio Corp., 118 F.2d 24 (1941), where the appellant had sought a rehearing for the grant of a construction permit in order to examine the ability of the community to support an additional station without harm to the public interest. In that case the court found that the offer of the evidence was untimely, and said, "We cannot allow the appellant to sit back and hope that a decision will be in its favor and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed." Colorado Radio Corp., supra at 26.

[R. 391][R. 74][R. 715]

9. Although in our view the question of timeliness is decisive in this case, we have nevertheless examined the voluminous material submitted in the Petition for Reconsideration and have concluded that it does not present matter so compelling as to call for action by the Commission, on its own motion, designating the applications for hearing on the Carroll issue.

10. The other allegations of Valley (i.e., those dealing with matters other than the Carroll issue) re-argue points we discussed in the Memorandum Opinion and Order issued when we granted the applications, and petitioner has offered no new factual allegations. In that Memorandum Opinion and Order we considered and discussed the arguments pertaining to the extension application.

11. In view of the foregoing, IT IS ORDERED, This 9th day of December, 1963, that the Petition for Reconsideration filed by Valley Telecasting Co., IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple
Secretary

Released: December 9, 1963
cc: Samuel Miller, Esquire

FCC Form 314
July 1954
Section I

Form Approved
Budget Bureau No. 52-RO27-10

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION

APPLICATION FOR CONSENT TO ASSIGNMENT OF RADIO
BROADCAST STATION CONSTRUCTION PERMIT OR LICENSE

File No. *105-71*

Name and post office address of assignor (See Instruction A for Part I)

Robert Hardy Langill and Robert
William Crites d/b/a Desert
Telecasting Company

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GENERAL INSTRUCTIONS

A. This form is to be used in all cases when applying for Authority for Assignment of a Radio Broadcast Station Construction Permit or License. It consists of two parts which are to be completed by the Assignor and the Assignee, respectively.

B. The assignor's part consists of pages 1, 2, and 3 of Section I.

C. The assignee's part consists of pages 4 and 5 of Section I and the following other sections:

Section II, Legal Qualifications of Broadcast Applicant

Section III, Financial Qualifications of Broadcast Applicant

Section IV, Statement of Program Service of Broadcast Applicant

Information requested of the assignee in Paragraphs 1 and 3 of Section III of this application is not required of an assignee of a licensed station but must be furnished by an assignee of a permittee only.

D. Prepare and file three copies of this form and all exhibits and swear to one copy. File with Federal Communications Commission, Washington 25, D. C.

E. Number exhibits serially in the spaces provided in the body of the form. List exhibits furnished by the assignor on page three of this part; list the assignee's exhibits on page five of Part II. Date each exhibit.

F. Information called for by this application which is already on file with the Commission need not be refiled in this application provided (1) the information is now on file in another application or FCC form filed by or on behalf of these applicants; (2) the information is identified fully by reference to the file number (if any), the FCC form number, and the filing date of the application or other form containing the information and the page or paragraph referred to, and (3) after making the reference, the applicants state: "No change since date of filing." Any such reference will be considered to incorporate into this application all information, confidential or otherwise, contained in the application or other form referred to. The incorporated application or other form will thereafter, in its entirety, be open to the public.

G. BE SURE ALL NECESSARY INFORMATION IS FURNISHED AND ALL PARAGRAPHS ARE FULLY ANSWERED. IF ANY PORTIONS OF THE APPLICATION ARE NOT APPLICABLE, SPECIFICALLY SO STATE. DEFECTIVE OR INCOMPLETE APPLICATIONS MAY BE RETURNED WITHOUT CONSIDERATION.

Send notices and communications to the following named person at the post office address indicated:

Samuel Miller, 1032 Wash. Bldg.,
Wash., D. C.

Name of assignee

Desert Telecasting Company, Inc.

Address of assignee (number, street, city, state)

1320 4th Avenue, Yuma, Arizona

1. Authorization which is proposed to be assigned

Call letters

Location

KBLU-TV

Yuma, Arizona

File number

Date of grant

BPCT-2979

July 23, 1962

If license, give
expiration date

If construction permit, give
date of required completion
March 23, 1963

Authorizations of any Remote Pickup, STL, or other stations
which are to be assigned

Call letters

File numbers

2. Is assignor or any person controlling assignor party to any litigation or proceeding which may in any manner affect (or be affected by) the proposed assignment? If so, describe fully

Yes ☐ No ☒

FEB 24 1963

F. C. C.

3. Give a full statement of assignor's reasons or purposes for requesting this assignment. It is the desire of Mr.

to consolidate into one entity KBLU-TV and he individually owns. Mr. Langill has recently purchased a gift show and desire to withdraw from said partnership. Under this proposal, Mr. Crites would obtain additional financing from both operation through the introduction of Mr. and Mrs.

INSTRUCTIONS FOR PART I (Assignor)

A. The name of the assignor must be stated exactly as it appears in the authorization to be assigned.

B. This part of this application must be executed by assignor if an individual; by one of the partners of the assignor if a partnership; by an officer of assignor if a corporation or association; or by attorney of assignor only under conditions shown in Section 1.303, Rules Relating to Practice and Procedure, in which event satisfactory evidence of disability of assignor or his absence from the Continental United States and authority of attorney to act must be submitted with application.

4. Do you propose to request a tax

Yes ☐ No ☒

certificate pursuant to Section 112 (a) of the Internal Revenue Code if this proposed assignment is granted? If so, submit as Exhibit No. a brief statement giving the basis for this request.

5. If this application is approved, Yes ☒ No ☐

will assignor upon the settlement date either file with the Commission or furnish to assignee (show which), for the period from the first of the calendar year to the settlement date, the broadcast operating and statistical data relating to the station or stations involved which are called for in Schedules 1 and 2 of the Annual Financial Report (FCC Form No. 324)? Will furnish to Assignee

FCC Form 314

PART I (Continued)

Section 1, Page 2

8. Is the information shown in Yes ☒ No ☐
 assignor's Annual Ownership Report now on file with
 the Commission true and correct as of this date?

If the answer is "No", attach as Exhibit No. _____ an
 Ownership Report supplying full information to bring
 such data up-to-date.

9. Does the assignor, or any partner, officer, director,
 member of the assignor's governing board, or any stockholder
 owning 10% or more of the assignor's stock, have any inter-
 est in or connection with the following (if so state what
 interest or connection):

a. Any standard FM, or television broadcast station? Robert Crites is
 the individual licensee of Station KBLU

b. Any application pending before the Commission?

c. Approved and/or denied applications?

10. Attach as Exhibit No. 1 a schedule showing the
 original cost, the original date of purchase, the
 original cost less depreciation, and the estimated re-
 placement cost for each item listed in Schedule 3 of
 the annual Financial Report. (Original Cost means
 the actual cost to the first person dedicating the
 property to broadcast service. Original Purchase
 date means the date on which the property was first
 dedicated to broadcast service.) If the information
 is not available, show why and furnish estimates. If
 the assignment arises out of death or legal disabili-
 ty of assignor, or is made without valuable con-
 sideration for the properties and equipment assigned,
 the assignor need not supply the information called
 for in this paragraph. However, the Commission re-
 serves the right to call for information as to the
 station's technical and non-technical equipment and
 property.

9. Attach as Exhibit No. 1 a balance sheet showing as-
 signor's present financial condition.

10. Describe fully and give present values of any properties
 equipment, or other assets, exempted from, or liabilities
 not involved in, the proposed assignment together with re-
 sulting effect on net worth shown in balance sheet of
 assignor.

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None

11. a. Attach as Exhibit No. 2 copies of the contract or
 agreement to transfer the property and facilities of the
 station including also but not limited to trusts, leases,
 debentures, and any other instruments which affect or con-
 cern the assignment (See Sec. 1.342 of the Commission's
 Rules). If there is only an oral agreement, reduce the
 terms to writing and attach.

b. Is this instrument joined in Yes ☐ No ☒
 by assignor?

If the answer is "No", explain why the instrument is not
 jointly executed by assignor and assignee. Not signed by
 assignor because it purports to be an assignment and bill of sale by assignor
 otherwise) to be paid for the properties, etc., to be
 transferred and describe terms of payment.

\$660 in cash upon Commission approval

The assignor represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination
 on any other application with which it may be in conflict.

All the statements made in this part of this application and attached exhibits called for by this part are considered material
 representations, and all the exhibits are a material part hereof and are incorporated herein as if set out in full in this ap-
 plication.

The assignor, or the undersigned on the assignor's behalf, states that he has endeavored to supply full and correct information
 as to all matters which are relevant to this application and that he has done so as to all matters within his own knowledge.

Dated this 15th day of February, 1963

Robert Hardy Langill and Robert W.
 Crites d/b/a DESERT TELECASTING COMPANY

By Robert Hardy Langill (Name of assignor)

Partner

Title

Subscribed and sworn to before

on this _____ day of _____, 19____.

Notary Public

(Notary public's seal must be affixed where the law of
 jurisdiction requires, otherwise state that law does not require seal.)

My commission expires _____

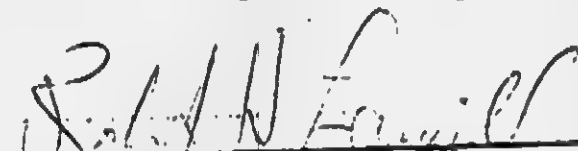
ASSIGNMENT AND BILL OF SALE

KNOW ALL MEN BY THESE PRESENTS:

That ROBERT HARDY LANGILL, for and in consideration of the sum of Eight Hundred Sixty and No/100 Dollars (\$860.00), due and payable within ninety (90) days from date hereof, or ninety (90) days after Federal Communications Commission approval, whichever is earlier, agrees to grant, bargain, sell and convey and assign and set over unto ROBERT WILLIAM CRITES, and/or his nominee, subject to prior consent of Federal Communications Commission, all of his right, title and interest in and to that certain construction permit granted by the Federal Communications Commission, the same being File No. BPCT - 2979, dated July 23, 1962, to have and to hold the same to the said ROBERT WILLIAM CRITES or his nominee, their heirs, executors and assigns, forever. That the undersigned, ROBERT HARDY LANGILL, does further affirm that the said sum of Eight Hundred Sixty and No/100 Dollars (\$860.00) is the actual amount of cash advanced by him for his interest in the said construction permit, and that by the payment of the said Eight Hundred Sixty Dollars (\$860.00) he realizes no profit of any kind or nature upon the said sale.

The undersigned does further covenant and agree to execute such other and further documents as is necessary to effect a change of ownership on the Federal Communications Commission records.

IN WITNESS WHEREOF, I have hereunto set my hand this _____
day of February, 1963.


Robert Hardy Langill

FCC Form 314

PART II (To be completed by ASSIGNEE)

Section I, Page 4

INSTRUCTIONS FOR PART II (Assignee)

A. The name of the assignee, stated in Section I hereof, shall be the exact corporate name, if a corporation; if a partnership, the names of all partners and the name under which the partnership does business; if an unincorporated association, the name of an executive officer, his office, and the name of the association. In other sections of the form, the name need be only sufficient for identification of the assignee.

B. This part of this application must be executed by assignee if an individual; by one of the partners of the assignee if a partnership; by an officer of assignee if a corporation or association; or by attorney of assignee only under conditions shown in Section 1.303, Rules Relating to Practice and Procedure, in which event satisfactory evidence of disability of assignee or his absence from the Continental United States and authority of attorney to act must be submitted with application.

C. Before filling out this application, the assignee should familiarize himself with the Communications Act of 1934 and the following parts of the Commission's Rules and Regulations: Part I, Rules Relating to Practice and Procedure; Parts Relating to the Broadcast Services.

1. Give a full statement of assignee's reasons or purposes for requesting this assignment.

Provide additional ownership capital for construction of KBLU-AM and TV. Desire of Robert Hardy Langill to withdraw from KBLU-TV. Desire of Mr. and Mrs. Noga to acquire interest in radio property in Yuma market, of which Mr. Noga has made study

2. What is the name and address of the owner of the station (if other than the assignee)?

a. Identify by date and names of parties any contracts entered into by assignor (including those for network service, use of mechanical records, sale of bulk time, etc., filed pursuant to Section 1.342) which will be performed by assignee.

KBLU-AM studio lease; A.P., transcription services

b. If any changes will be made in contracts assumed by assignee, describe fully

None

3. Attach as Exhibit No. I a projected balance sheet showing assignee's financial condition after giving effect to the provisions involved in this application as of the same date of the balance sheet submitted in response to Section III, Para. 2, of this application.

Name and post office address of assignee (See Instruction A for Part II)

Desert Telecasting Company, Inc.
1320 4th Avenue
Yuma, Arizona

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Send notices and communications to the following named person at the post office address indicated: Samuel Miller, Wash. Bldg., Wash., D.C., and Farber, Diamond, 608 5th Ave., N.Y. 20, N.Y.

4. a. Will assignee's control over the station, its property and equipment arise out of voluntary agreement with the assignor? If the answer is "Yes", attach three copies of the agreement as Exhibit No. , unless heretofore attached in answer to Par. 11a, Part I of Section I hereof.

Yes ☒ No ☐

Any contract, lease or other voluntary agreement under which assignee claims control over the station must specifically show (1) assignee will have complete control over all necessary physical property and its use and unlimited supervision over the programs to be broadcast; (2) consideration, whether monetary or otherwise, and whether paid or promised; (3) all other terms and conditions involved in the assignment, including a statement that the instrument submitted covers the entire arrangement between the parties (if it does not, all other pertinent legal instruments must be submitted); (4) assignment is subject to consent of the Commission.

b. Will assignee's control over the station, its property and equipment arise out of involuntary action? If the answer is "Yes", give as Exhibit No. a full narrative statement of the character and status of proceeding (i.e., administration of estate, bankruptcy, dissolution, etc., or operation of law in any other manner), showing all parties thereto, and attach copies of will, letters testamentary, letters of administration, or pleadings and court orders properly certified by the clerk of the court having jurisdiction over the matter.

Yes ☐ No ☒

The assignee waives any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by licensee or otherwise, and requests consent to the assignment of this license and/or construction permit in accordance with this application. (See Section 304 of the Communications Act of 1934)

The assignee represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict.

All the statements made in this part of this application and attached exhibits called for by this part are considered material representations, and all the exhibits are a material part hereof and are incorporated herein as if set out in full in this application.

[R. 84]

[Rec'd February 20, 1963 - FCC]

EXHIBIT II**Response to Section II and III**

There is being filed with the Commission an application for the assignment of license for Station KBLU-AM.

Sections II and III thereof are hereby incorporated by reference.

The construction costs shown in Paragraph 1 of BPCT-2979 are likewise incorporated herein by reference.

The proposed construction will be financed through cash to be raised by subscriptions and loans noted in the application submitted simultaneously herewith, as well as the deferred payment plans.

[R. 105]

[Rec'd. March 20, 1963 - FCC]

BREAKDOWN OF ORGANIZATIONAL EXPENSES, KBLU-TV

Nov. 28, 1961 through Oct. 13, 1962

Legal fee, Samuel Miller	\$200.00
Duplicating expense	7.82
Duplicating supplies	33.75
Engineering fee, Tom Friedman	500.00
Legal fee, Samuel Miller	300.00
Photostat expense, Cooper-Trent	12.57
Air Travel, to inspect equipment at NAB Convention, 1962	195.36
Map, Geological Service	.30
Legal fee, Brandt & Baker	160.75
Air Travel, to Los Angeles	43.82
Purchase of broadcast rate book	5.00
Duplicating material	8.84
Legal publishing, for corporation	143.14
Phone calls, charged to Robert Crites	100.10
Duplicating materials	<u>8.84</u>
Total:	\$1,720.29

[R. 109]

[Rec'd April 8, 1963 - FCC]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D.C.

In re applications of
Robert Hardy Langill and
Robert William Crites d/b/a
Desert Telecasting Company
(Assignors)

and

Desert Telecasting Company, Inc.
(Assignee)

For Consent to the Voluntary
Assignment of permit which
authorized the construction
of a new television station
(Station KBLU-TV) in Yuma,
Arizona

File No. BAPCT-328

Robert William Crites t/a
Desert Broadcasting Company
(Assignor)

and

Desert Telecasting Company, Inc.
(Assignee)

For Consent to the Voluntary Assign-
ment of License of Standard Broadcast
Station KBLU, Yuma, Arizona

File No. BAL-4738

PETITION TO DENY

Valley Telecasting Co., Inc., licensee of Television Station KIVA, Yuma, Arizona (hereinafter called "Valley" or "KIVA"), pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended, respectfully petitions that the above-captioned application for the assignment of construction permit of Station

[R. 110]

KBLU-TV, and the contingent application for the assignment of license of Radio Station KBLU, both in Yuma, Arizona, be denied.

(a) Preliminary Statement

1. Station KIVA-TV is the only local television station licensed in Yuma, Arizona. On December 5, 1961, Valley filed a petition to deny the application of The New England Industries Incorporated for a permit to construct a new television station in Yuma, Arizona (BPCT-2969). This petition, which is hereby incorporated by reference, set forth in documented detail why the establishment of an additional television station in the Yuma, Arizona market would cause destructive economic injury contrary to the public interest. In essence, it was shown that KIVA, which has been operated at a loss for several years, and which had been subject to bankruptcy proceedings when in the hands of former owners, has just slowly started to become a self-sustaining operation; that by the improvement of equipment and affiliation with all networks as well as an aggressive and up-to-date sales policy, it has exhausted the revenue potential of its market; that despite this fact, Valley was a long way from recouping its tremendous past operating losses; that the deprivation of even a small amount of its current revenues would again hopelessly revert the station to a loss operation and, that such an occurrence would eventually deprive the entire Yuma market of the benefits from a local television outlet contrary to the Commission's express

[R. 111]

priorities and allocation plans and contrary to the public interest as enunciated by the Court of Appeals in Carroll Broadcasting Company v. FCC, 258 F. 2d 440.

2. Subsequently, the Desert Telecasting Company also filed an application (BPTC-2979) for a construction permit for a new television station to operate on the same facilities for which New England Industries, Incorporated, applied. In the belief that these rival applications would be involved in a comparative hearing whose termination date would be in the distant and unforeseeable future and not knowing what the economic circumstances would be in the Yuma market at that future date, Valley

withdrew its petition to deny reiterating, however, that as of then, Yuma was unable to support another television station.

3. After the subsequent withdrawal of the New England Industries application, Desert Telecasting Company (hereinafter "Desert") was granted a construction permit but did not commence construction. Valley was not aware of Desert's ability to put the construction permit to use. The instant assignment applications, however, indicate that now that Desert is in possession of a permit, it has ostensibly found the needed financing, by bringing in new, non-resident ownership capital, for commencing actual construction. That this new capital is needed to proceed with its plans is well demonstrated by the fact that Desert also requested an extension

[R. 112]

of time within which to construct and, in this application, for extension, makes construction dependent upon the grant of the instant applications.^{1/} The destructive economic threat of the early establishment of an additional television station in Yuma has thus been raised again by the instant applications.

4. It is the purpose of this petition to oppose the grant of these applications because of these economic grounds, as detailed below, and to bring to the Commission's attention up-to-date facts which clearly indicate that the economic circumstances of the Yuma market have not materially changed since the above-mentioned 1961 petition to deny and that the grant of these applications would indeed cause an economic destruction ultimately resulting in the demise of Station KTVA contrary to the public interest and further resulting in the elimination of all local television service in Yuma, also contrary to the public interest. Furthermore, Valley wishes to call to the Commission's attention some other facts and circumstances which raise serious questions as to whether the grant of the above-captioned applications would serve the public interest.

(b) The "Carroll" Issue

5. Valley Telecasting is the licensee of Television Station

1/ The application for extension of time is discussed in a separate petition to deny, filed against that application simultaneously herewith.

[R. 113]

KIVA, Channel 11, Yuma, Arizona. It operates with full power and maintains studios at its transmitter site near Yuma, as well as an auxiliary studio in El Centro, California. Valley is affiliated with and is carrying programs of ABC, CBS and NBC.^{1/} Station KIVA serves Yuma County in Arizona, Imperial County in California, as well as portions of San Diego and Riverside Counties in California. Except for a Mexican television station, which programs predominantly in the Spanish language, and which serves part of the above market, and possible fringe service from San Diego and Los Angeles, which can be received only by exceptionally high and expensive home antennas, KIVA is the only television station serving Yuma, most of Yuma County, El Centro, other nearby cities, and most of Imperial County.

6. Despite its apparently favorable position, Valley has been unable substantially to expand or increase its local advertising revenues. Its financial history reflects a struggle for survival. KIVA's first ownership, which put the station on the air in 1953, was forced to undergo an arrangement for creditors under Chapter XI of the Bankruptcy Act in 1957, and the station ownership was transferred to new owners. Since that time the station has made intensive efforts to improve its operation. Improved transmitter, antenna, microwave and projection equipment

1/ CBS terminated its affiliation contract with KIVA as of August, 1963 in the hope of affiliating with Desert.

[R. 114]

have been installed and the El Centro auxiliary studio has been established. These improvements have enabled KIVA to televise improved and more varied programming at maximum power to an enlarged audience.

7. As was pointed out in the previous petition to deny, as a consequence of these Herculean efforts, KIVA first showed a profit -- of \$5,300.00 -- in 1960. As was also explained, this gain affected the operating deficit of over \$400,000.00 but in a small way. This profit figure dropped to \$3,642.00 in 1961, confirming doubts expressed in the 1961 petition concerning a general upswing in the economy of the market. This marginal financial performance also casts a shadow on the 1962 record performance of an actual net profit of \$15,140.00 from KIVA operations,^{1/} indicating that no reliance can be placed on a normal systematic reduction of the operating loss figure, still close to \$400,000.00, in the foreseeable future. In fact, the total broadcast revenues decreased from 1961 to 1962 by \$40,592.00 and the 1962 record breaking profit figure is the result of savings in expenses which cannot be hoped to continue in the face of generally rising costs.

8. Significantly, KIVA's revenues from CBS were \$17,859.00 in 1961 and \$18,368.00 in 1962. As was remarked before, KBLU-TV

^{1/} The profit figures represent the net broadcast income of Valley as reported by its accountants and does not include income from other sources which prior reports to the Commission also reflect. The annual financial reports of Valley are not incorporated in this petition.

[R. 115]

proposed to affiliate itself with CBS and CBS has already given notice of termination to KIVA of its affiliation contract. Obviously, the loss of CBS revenue alone would again render KIVA a loss operation. While, realistically, the loss of CBS affiliation revenues can be partially restored, local competition by another television station in Yuma would obviously make further inroads on all other on all other non-network

revenue sources in an already exhausted market as well. For instance, it is estimated by Desert that it would receive revenues in the amount of \$90,000.00 during its first year of operation. In light of the economic circumstances in Yuma, as outlined above, it is highly questionable whether Desert could achieve its optimistic wishes. It seems, however, that if even a part of its exaggerated hopes materialize, its operation would hopelessly reduce KIVA, which is now slowly getting on its feet, to a perennial financial loss and would ultimately drive KIVA off the air.

9. Nor is there any assurance that the limited operation proposed by Desert would, after the demise of KIVA, be willing or able to shoulder the full responsibility of providing the same local facilities which KIVA now provides. Under the present proposal of Desert, even if its most optimistic expectations materialized, it would provide but a fraction of the coverage of KIVA during part of the KIVA broadcast time. The local television service, after KIVA has been driven out of the market would, there-

[R. 116]

fore, substantially be reduced and certain areas, which KIVA's full-powered facilities reach, would be immediately deprived thereof. In a precarious marginal market such as Yuma, as shown above, the slightest reduction in revenue spells a loss. By rendering but a part of KIVA's service, the television revenues would similarly reduce. The reduced revenue because of the reduced service, combined with the inexperience in television operations on the part of the Desert management, would thus ultimately cause its own financial ruin. Moreover, in contrast with KIVA's past history of service despite financial loss, it is questionable how long Desert would be able to or would be willing to provide even this limited service. Finally, after having ruined Valley, Desert, too, would discontinue operations thereby causing a total loss of all local television service to the entire Yuma area. As the Commission stated in WHAS, Inc., 21 RR 929, 939 (1961):

"While the Act surely precludes the Commission from regulating competition per se, and from guaranteeing a particular broadcaster a profitable operation, it does not require the Commission to guarantee such broadcaster a non-profitable operation to the detriment of the public interest."

The destructive economic competition threatened by the above applications, therefore, seriously affects the public interest. Carroll Broadcasting Company v. FCC, supra.

[R. 117]

(c) Character Qualifications

10. Implicit in any application for a permit to construct a broadcast station is the representation that, if such application is granted, applicant would proceed to construct the facility as authorized. As the Commission has recently warned UHF television permittees, an application to reserve a channel, without the intent to use the authorization therefor, is against Commission policy and contrary to the public interest. Moreover, it is implicit that the applicant represents his belief that he is financially qualified to proceed with construction as per the financial plan and showing made in his application. It needs little argument to state that it is contrary to the public interest and to the Commission policy embodied in its licensing proceedings first to obtain a broadcast authorization and then to obtain new ownership capital from formerly undisclosed sources so as to enable the validation of the authorization.

11. In the instant case, assignors in BAPCT-328 obtained their television construction permit representing that they were willing and able to go forward with the construction of the proposed station. Now it develops that at least one party to the application does not wish to do so and the other requires new and additional funds. The new financier, however, insists upon an ownership share for Mr. and Mrs. Noga in return for these funds. It is proposed, therefore, that the permit, which the present owners never

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had the intention to use, nor did they possess the requisite funds for its utilization, be transferred to a new corporate shell which would be given life by the transfusion of Mr. John Mathis' money. It seems that with the permit in hand, some promise of money could finally be raised, even though only by the surrender of corporate control.

12. Under these circumstances, the question emerges whether the proposed assignors' representations when obtaining the permit were true. Upon the answer to this question hinges the determination as to whether the Commission can place any future reliance upon the representations of Mr. Crites, who is proposed to be a principal and the managing head of the proposed new permittee and, ultimately, whether in light of the evidence adduced in answer to that issue, the public interest would be served by the grant of the assignment application. It is questionable whether or not the practice of which these assignors are guilty constitutes "trafficking" within the Commission's definitions of that term. The acquisition of broadcast authorizations and the subsequent acquisition of the ownership funds to put such authorizations to use, however, are at least as repulsive if not more so than trafficking, and reflect upon the candor of the permittee in such a degree as to put in issue his basic character qualifications to become a licensee of the Commission.

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13. Nor is the scheme here proposed a novel plan for Mr. Crites. A perusal of the files of Station KAPP (FM), Redondo Beach, California, indicates that the pattern here proposed to be followed has already been successfully developed before. The files reveal that Robert William Crites, a partner in a joint venture with Sherman Somers, doing business as South Bay Broadcasting Co., obtained a construction permit for a new FM station, now Station KAPP. In September of 1960, Somers and Crites applied for consent to the assignment of that permit to Crites and a new investor, George G. Gillum (BAPH-235). Somers was dropped after his expenses were refunded and the Commission granted the

application on February 1, 1961. A license to cover the construction permit was then obtained and Crites was ready to sell his share to his new partner Gillum. Crites and Gillum filed for consent to the assignment of the license (BALH-548) which was granted on September 14, 1962. The pattern appears to be clear and it seems that, unless the Commission halts these activities by questioning these recent proposed assignments, it would find itself condoning the acquisition of permits by financially unqualified individuals who, with the authorization in hand, are later able to transfer control to the financiers. The profit taking in such practice is not obvious and immediate, but the unqualified individual can thus put to use a mere permit which it could not have been able to put to use on its own, and later sell the going operation after the license has been

[R. 120]

obtained. The Commission can obviously step in the initial phases of this operation before the delayed pay-off occurs.

14. In this particular instance additional questions emerge because the new absentee investors, who would become directors and officers of the transferee corporate shell, apparently do not wish to invest their own money in that venture. Instead of obtaining the investment capital from the usual commercial sources, however, it would be furnished by a Mr. Johnny Mathis, with whom they are in partnership in several business dealings and whom they represent as agents. While raising the above questions of candor, it may be well to inquire into the nature of Johnny Mathis' participation, if any, in the proposed venture and to examine what control, if any, he would exert, in light of his close relationship with the Nogas, upon the prospective licensee corporation which would come into financial existence upon his unsecured loan through the Nogas. Should it turn out that Mr. and Mrs. Noga have invested substantial sums for Mr. Mathis in their own name in the past, the Commission may well be interested in whether the instant transaction is a part of their agency relationship with him.

Conclusion

In light of the above, it is respectfully requested that the above-captioned applications be designated for hearing on such issues raised by this petition to deny as are warranted in light of Carroll v. FCC, supra, of Section 1.365 of the Commission's

[R. 121]

Rules and Regulations, of the Commission's policy on requiring full candor of its applicants, permittees and licensees; to inquire whether the applicants possess the necessary character qualifications; and to explore such other and further issues as the Commission may deem just and proper under the circumstances.

Respectfully submitted,

Valley Telecasting Co., Inc.

By: /s/ Reed Miller

 /s/ Thomas G. Fisher
 Arnold, Fortas & Porter

* * *

Dated: April 8, 1963

Its Attorneys

[Certificate of Service]

[R. 122]

AFFIDAVIT

STATE OF ARIZONA)
) SS:
 COUNTY OF MARICOPA)

I, the undersigned, Bruce Merrill, President of Valley Telecasting Co., Inc., licensee of Television Station KIVA, Yuma, Arizona, being duly sworn on oath, depose and say that I have read the foregoing "Petition to Deny" in re applications of Robert William Crites tr/as Desert Broadcasting Company, licensee of Station KBLU, Yuma, Arizona, for voluntary assignment of license to Desert Telecasting Company, Inc. (BAL-4738), and of Robert Hardy Langill and Robert William Crites d/b as Desert Telecasting Company, permittee of Station KBLU-TV,

Yuma, Arizona, for voluntary assignment of construction permit to Desert Telecasting Company, Inc. (BAPCT-328), that I know the contents thereof, and that the matters and things therein stated or denied are true of my own knowledge, save except those matters therein stated on information and belief, and as to those I believe them to be true.

/s/ Bruce Merrill

[JURAT - Dated April 1, 1963]

[R. 132]

EXHIBIT D

AFFIDAVIT

STATE OF ARIZONA)
) SS:
 COUNTY OF YUMA)

I wish to assure the Commission that when Mr. Robert William Crites and I made application for Channel 13 in Yuma, Arizona, it was my intention to be an active working partner in the station. As our application (BPCT-2979) shows, I had at my disposal adequate funds to insure my portion of the financial needs of the television station. After our construction permit was granted, and I was faced with the prospect of the actual operation, and the management responsibility, I realized that I was not emotionally prepared for these added burdens. I felt that I would not be able to devote the proper amount of time, concern, and responsibility that this participation demanded. I was forced by these conclusions to inform my partner, Robert William Crites, that I was not willing to proceed as I had previously promised. My decision, I told him, was the only honest one I could make, and that it was far better than getting into something that we would both regret later.

Crites immediately replied that he still wanted to proceed with the station, and that he would seek an investor or investors to take my place. I agreed to this.

At no time did I lack the financial backing to take a full part in the operation as originally proposed in our application.

/s/ Robert Hardy Langill

[JURAT - Dated April 16, 1963]

[R. 141]

[Rec'd. May 2, 1963 - FCC]

REPLY TO OPPOSITION TO PETITION TO DENY

Valley Telecasting Co., Inc., petitioner in the above-captioned matter (hereinafter "Valley" or "petitioner"), hereby responds to the opposition of Desert Telecasting Company, Desert Broadcasting Company and Desert Telecasting Company, Inc. (hereinafter "Desert") to Valley's petition to deny:

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1. Standing

1. Desert claims that Valley lacks standing because its damage flows from the possibility of the existence of a competing television station and not the change in its ownership. If the Desert station were, in fact, an existing station, on the air and operating, or if Valley had failed to demonstrate in its petition a causal relationship between the assignment of permit and the economic injury, Desert's argument would have validity. But, in this case, Desert seeks to assign a construction permit for a station not yet in existence and the causal connection between the contested application and the threatened injury has been clearly and explicitly alleged by Valley.

2. The Meachem and NBC cases,^{1/} cited by Desert, both involved the transfer of ownership of existing, operating stations. Thus, in the absence of a showing of changed or increased competition resulting from the proposed change in ownership, the Commission could find no causal relationship between the protested action and the alleged injury. In Boise Broadcasting Associates, 20 RR 1109, also relied upon by Desert, the assignment of a permit was involved. However, the protestant had alleged no

1/ James R. Meachem, 12 RR 1427; National Broadcasting Co., Inc., 19 RR 408.

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facts to indicate a causal relationship between the assignment and the threatened injury. Indeed, that case made it clear that had the protestant in Boise alleged facts similar to those alleged by Valley in the instant case, the protest would have been granted. The decision in Boise indicates that if a showing is made that an increase in existing competition will result from the contested assignment or that the proposed station is more likely to be built or more quickly placed in operation because of the assignment so that a grant of consent to the assignment will increase the likelihood of competition or otherwise adversely affect the protestant's interest, the requisite standing has been demonstrated. Thus, in Boise, the Commission stated:

"It is not alleged, for example, that an increase in competition will result from the protested assignment, or that the proposed station is more likely to be built, or that the station will be constructed and placed in operation quicker under the proposed assignment, or that construction costs will be reduced, thus enhancing the financial position of the proposed competitor. In fact, it is not even alleged that the protested assignment will cause protestant's interests to be adversely affected . . . It must be shown that the

Commission's grant of the latter assignment will, by increasing the likelihood of competition, or in some other manner, adversely affect the protestant's interest."

3. In the instant case, Valley has alleged and demonstrated precisely those elements which the Commission found lacking in Boise. When the construction permit was granted to Desert, there

[R. 144]

was no immediate threat of harm or damage to Valley. Valley was informed and believed at the time of the filing of the Desert application and at the grant of construction permit that Desert would or could not build under its existing ownership. That such information was accurate has been confirmed by subsequent events, including the instant request for approval of assignment of the permit. Indeed, Mr. Crites' own affidavit, (Ex. E to Desert's "Opposition to Petition to Deny"), page 1, indicates that within 30 days after grant of cp on July 23, 1962, he negotiated the terms of a lease for studios which "remained unsigned to this date, awaiting approval of the application for consent to transfer of the television permit, so that the new principals could appear on the lease." Thus, within 30 days after grant of cp, Mr. Crites was looking for a new partner and was in no position to build until he found one. His application for consent to assignment was not filed until February 20, 1963.

4. It is thus clear that it was not the original cp that threatened immediate harm to Valley. It has lain fallow from July, 1962, to date for lack of funds to implement it. The immediate threat of harm comes from the assignment application which, to use the Commission's language in Boise, threatens "that the proposed station is more likely to be built. . . that

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the station will be constructed and placed in operation quicker under the proposed assignment . . . that the Commission's grant of the . . .

assignment will, by increasing the likelihood of competition . . . adversely affect" Valley's interest.

5. In the hands of the present permittee the fallow instrument of authorization is harmless; the infusion of new finances into the proposed assignee, however, raises, for the first time, the spectre of immediate destructive competition, inflicting economic injury of a direct, tangible and substantial nature upon Valley. The application now protested is thus the proximate cause of Valley's threatened economic injury which Valley has clear standing to protest. Camden Radio, Inc. v. Federal Communications Commission, 94 U.S. App. D.C. 312, 220 F. 2d 191, 10 RR 2072 (1954) reh. den. 220 F.2d 195, 10 RR 2075a (1955).

6. Valley agrees with Desert that the sale of Radio Station KBLU, per se, should cause no economic injury to Valley or to the public. In contrast with the proposed assignment of the television construction permit, the operation of the existing standard broadcast station would have the same effect in the hands of another licensee. In the above applications, however, the sale of the AM station is intimately interlocked with the sale of the television permit. In fact, Crites' relinquishment

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of positive control in KBLU-AM is part of the consideration paid for the new capital investment by the Nogas in the proposed new corporate licensee and permittee. The sole reason for Valley's opposition to the transfer of the AM station is that it is part of the same transaction which would result in assignment of the television permit.

2. Economic Injury

7. In its Petition to Deny, Valley set forth the basic figures from which it has concluded that a new television station in Yuma would eventually cause the demise of all local television service because of destructive economic competition in a marginal market. It incorporated figures previously submitted to the Commission and supplied new ones in establishing its prima facie case. It is assumed, of course, that the

Commission, at the hearing, will wish to go into further details of the Yuma market situation and will require further details of Valley's financial experience before it reaches its final determination on the merits of Valley's claims. It is further assumed that the Commission would require Valley to carry at least part of the burden of showing that its allegations are well founded and that its conclusions are correct. Valley, by filing the petition to deny, assumed this burden.

[R. 147]

8. The facts and figures cited by Desert in opposition to Valley's petition do not dispose of Valley's contention. Desert's data indicates that while there is a very slow increase in retail sales, there is a disproportionately excessive population increase which may result in diminishing per capita retail sales. There is no doubt in Valley's mind that the past years have shown an overall, slow economic development in Yuma. The fact that Valley could turn KIVA from a loss operation to a self-sustaining one is some evidence of that fact. If the trend not only continues but improves substantially the time may some day arrive when Yuma will be able to support more than one television station. However, that time has not yet come, as Valley is ready and willing to prove. Moreover, nothing contained in Desert's opposition offers convincing evidence to the contrary. Valley's prima facie showing, therefore, stands inviolate.^{1/}

^{1/} Desert's allegations concerning KIVA's management (Opposition, para. 2) are factually incorrect and logically fallacious. The accounts of Station KIVA are kept separately from any other business of Valley and the station's affairs are pursued separately and with skilled personnel. The main studio of KIVA is close to Yuma and easily accessible to its transmitter site. Moreover, beginning May 15, 1963, it will be located in the heart of Yuma where Valley has recently constructed a new studio (See BMLCT-126).

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3. Other Matters

9. As to Desert's efforts to complete construction, Mr. Crites' affidavit attached as Exhibit E to Desert's Opposition serves to confirm Valley's charges. The affidavit, which purports to list in exhaustive detail all the activities of Desert toward the establishment of the station, clearly indicates that no actual construction has commenced and that no equipment has been ordered. Furthermore, the lease for studio space for which negotiations were allegedly completed before August 22, 1962,^{1/} remains unsigned because even at that early time the current Desert principals knew that an assignment would be necessary. They therefore left the lease unsigned in order to bind the proposed new principals. Indeed, this admission by Crites under oath raises the question of whether Crites and Langill may have reached an understanding as to the sale of the permit in violation of Section 1.342 of the Commission's Rules long before such contract was actually filed with the Commission. But apart from this question, it further indicates that Desert intended no diligent efforts toward the actual construction of the station before additional funds were obtained. That this is still Desert's attitude is demonstrated by its instant request for

^{1/} The affidavit states that this was done within 30 days of the July 23, 1962 grant.

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additional time to construct, which Desert expressly conditions upon the grant of the assignment application.

10. Crites' above affidavit shows that Desert, at the present time, has the following: (1) a construction permit, (2) an unsigned and legally unenforceable lease for a studio, (3) an agent for the purchase of films, and (4) a network affiliation contract. Thus, nine months after the grant of the permit, all Desert has is papers, plans and promises. As previously alleged, Desert plans to use its construction permit to obtain

construction funds, and, as will be later shown here, plans to use its network affiliation as its sole source of revenue.

11. On the question of trafficking, the Crites' method is only one step removed from the simple act of buying and selling for profit. The end result, however, is the same. The Crites' method involves the following steps: (1) obtain a construction permit, together with a 50% partner, (2) replace the partner before the license is issued by a new partner, who reimburses the old one for out-of-pocket expenses, (3) obtain license and run station until its value is established, and (4) sell own interest in station for profit. This cycle was completed by Crites in his transactions with KAPP broadcast authorizations.^{1/}

^{1/} Crites' protestations that he made no money on the KAPP deal are irrelevant. While profit taking would be one of the indicia of trafficking, trafficking involves the profit motive rather than actual profit taking. Crites' intent, therefore, is the controlling criterion. And intent can be inferred from the recurrent pattern and other circumstances.

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He now proposes to complete Step (2) in the KBLU-TV cycle unless halted by the Commission action here requested by Valley. Petitioner urges that the Commission should not wait until Step (4) comes around before delving into Mr. Crites' motives.

12. Desert has presented with its Opposition supporting letters from three local city officials. Valley does not question the sincerity of their concern. However, it does question whether these few citizens of Yuma, who understandably wish to have additional local television outlets, were given the opportunity to analyze the figures presented by Valley which show that, if an additional station is established in Yuma at this time, the eventual demise of all local television service may result. Based upon the tenor of their letters, it would appear most likely that these individuals, if given the choice, would prefer one television station in Yuma rather than the eventual destruction of all local television service. Nor is it likely that these individuals were informed by Desert that its

new television service would operate as a satellite of a distant CBS affiliate, functioning essentially as a network "spigot", with neither the facilities nor the intent to broadcast local programs.

13. As the attached affidavit from Mr. Leavenworth Wheeler, General Manager of Station KIVA-TV, indicates, the price of Desert's CBS affiliation, or the inducement upon which such affili-

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ation was bestowed on it, is its promise to carry all CBS network programs regardless of whether KBLU-TV has been ordered by the national advertisers in the network lineup. And while Mr. Crites' offer to carry the entire CBS network schedule "starting with Captain Kangaroo through the end of the day's schedule" appears to be somewhat over-ambitious in view of the limited hours of operation proposed for KBLU-TV, it is, by the same token, obvious that the total output of the CBS network can certainly fill the hours in which Desert proposed to broadcast, whether these programs are carried live, delayed, or taped.

14. Desert's commitment to CBS to take its entire output is obviously contrary to its commitment to the Commission in the application here in question. The Desert application calls for 11.7% live programming and 58.7% network programming. It is difficult to see how Desert can live up to either of these promises in view of its proposal to function as a full-time CBS spigot. Certainly, its network satellite proposal is not the local broadcast outlet which the Yuma citizenry have in mind nor is it the kind of operation which this Commission should permit to drive the existing local station off the air.

15. It is also interesting to contemplate the number of commercial spots with which KBLU-TV would have to saturate its programs in order to deliver the promised programming and com-

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mercials. Desert proposes to operate the station for 58 1/3 hours per week. 34% of this time, or 19 hours and 50 minutes, would be sustaining.

In order to log this time as sustaining, KBLU-TV can only broadcast commercial spots of 30 seconds duration at the end of the 14 1/2 minute sustaining segments. Assuming 20 hours of sustaining time, this leaves room for four 30 second commercials per sustaining hour, or 80 commercials within the time reserved as non-commercial. The remaining 620 spots from the total of 700 spots proposed would have to be broadcast during the remaining 38 1/2 hours of commercial time. This would entail an average of over 16 commercials per hour. Should this be considered excessive, it should also be noted that an additional 234 non-commercial spot announcements are proposed to contribute further to the already too frequent interruption of program continuity.

16. In conclusion, Valley submits that a rational review of Desert's application and its recent activity, or rather inactivity, raises serious questions with regard to its diligence, candor, trafficking, rule violations, over-commercialization and total network control. Desert's opposition to Valley's petition supports rather than resolves these questions. Moreover, the opposition has neither disposed of Valley's charges as to economic

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injury nor successfully challenged Valley's standing to seek relief. A hearing on the appropriate issues is thus clearly justified.

Respectfully submitted,
Valley Telecasting Co., Inc.

By:
/s/Reed Miller

/s/Thomas G. Fisher
Arnold, Fortas & Porter

* * *

Its Attorneys

Dated: May 2, 1963

[Certificate of Service]

State of Arizona)
) ss
County of Yuma)

The purpose of Mr. Clancy's call was to break the news to me that on the following day the CBS Television Network would place in the mail a notice of cancellation of its affiliation agreement with KIVA effective with the close of broadcasting August 14, 1963. I had had no prior warning or advice that CBS might be contemplating this drastic action. While it was true that with a tri-network affiliation KIVA could not possibly accept all of the business offered by any one network, I was not aware that CBS might feel our lack of program clearances in the measure they deemed necessary could lead them to even consider this step.

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Mr. Clancy countered by stating that CBS had many fine programs which were not being seen in Yuma; that he thought they should all be seen in Yuma, and to that end CBS was to sign an affiliation agreement the following day with Mr. Robert Crites, holder of a construction permit for KBLU-TV, Channel 13, in Yuma.

I pursued the matter further, asking Mr. Clancy if CBS considered the modest power proposed for KBLU-TV together with the probable limited number of commercial orders which the latter might expect to obtain could offset the network revenue obtained from the full sponsorship of the fewer programs carried by KIVA and enjoyed throughout the entire Yuma-El Centro market served by our maximum power signal.

Mr. Clancy explained that while KBLU-TV would be paid the lowest CBS network rate of \$50.00 per hour, CBS felt that the admittedly much smaller coverage expected by KBLU-TV would satisfy his network's needs by covering the "metropolitan Yuma area", especially since Mr. Crites had agreed to clear the entire CBS network schedule "starting with Captain Kangaroo and continuing through the end of the day's schedule."

I reiterated that with the \$150.00 rate enjoyed by KIVA, CBS might net a greater return by continuing our affiliation even though acceptance of all programs was not possible. With a \$50 rate I was making the point that KBLU-TV would have to obtain at least three times the commercial orders held by KIVA, and that

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with very limited coverage it did not seem reasonable that national network sponsors would order KBLU-TV to that extent.

Further, after my questioning if Mr. Crites would carry those CBS commercial programs which in part or in their entirety might not be ordered for KBLU-TV, Mr. Clancy said this was his understanding; that unordered commercial positions would be blocked by the station and public service or promotion material inserted. I also learned that KBLU-TV would obtain its network service by means of off-the-air pickup of KOOL-TV, the CBS affiliate in Phoenix, Arizona. I asked Mr. Clancy if KBLU-TV might not expect to regularly carry non-network programs broadcast by KOOL-TV. He declined comment, but it was my observation that with such carte blanche acceptance of all CBS programming KBLU-TV might be only a satellite of KOOL-TV.

/s/ Leavenworth Wheeler

[JURAT - Dated April 24, 1963]

[R. 169]

[Rec'd. August 30, 1963 - FCC]

Law Offices
SAMUEL MILLER
* * *

August 30, 1963

Mr. Ben F. Waple, Secretary
Federal Communications Commission
Washington 25, D.C.

Dear Mr. Waple:

This is to advise the Commission that on August 29, 1963, the assignment of construction permit for Station KBLU-TV, Yuma, Arizona, to Desert Telecasting Company, Inc. was consummated.

Form 323 will be filed shortly.

Very truly yours,
/s/ Samuel Miller

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[Rec'd. August 30, 1963 - FCC]

MOTION FOR STAY

Valley Telecasting Co., Inc., licensee of Television Station KIVA, Yuma, Arizona (hereinafter "Valley" or "petitioner"), a petitioner in the above-captioned proceedings, respectfully moves that the Commission stay the effectiveness of its Memorandum Opinion and Order in the above-captioned matters (FCC 63-785) and of its Order in File No. BAL-4738, both released on August 9, 1963, pending disposition of the Petition for Reconsideration to be filed by Valley on or before September 9, 1963, requesting

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a review of the grant of the above-captioned applications. In support of this motion for stay, Valley submits the following grounds:

1. The grant of the above-captioned applications and the concomitant denial and/or dismissal of Valley's petitions directed against them took place in the absence of six of the seven Commissioners. These decisions, made by a board of one Commissioner, involve legal principles of great importance not only to petitioner but also to the communications industry and the bar. Thus, for instance, the decisions rule on the sufficiency of "economic protests" under the Carroll case,^{1/} promulgate new criteria for waiving the "three year rule"^{2/} in assignments and transfers of broadcast authorizations, announce new standards for measuring a permittee's willingness to construct, publish a new Commission policy of disregarding the number of commercial spots proposed in new applications, and declare new rules of pleading for establishing misrepresentation by applicants. Because of the impact of these decisions, Valley will file a Petition for Reconsideration requesting that the full Commission, en banc, review these matters.

1/ Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F. 2d 440, 17 RR 2066 (1958).

2/ Section 1.365 of the Commission's Rules and Regulations (47 C.R.F. § 1.365).

2. The multitude of problems which the above decisions raise require extensive work in preparing Valley's Petition for Reconsideration. Therefore, Valley does not expect to be able to file its Petition before September 9, 1963. It is expected that responsive pleadings may be filed to that Petition and that, because of the usually heavy workload confronting the Commission, several weeks may pass before the Commission will have an opportunity to pass on the matters raised in the Petition for Reconsideration, even though such decisions may be rendered some time before the expiration of the statutory 90 days after its filing.

3. In the meanwhile, it is essential that, pending a decision on the Petition for Reconsideration, the above-captioned applicants be barred from consummating the assignments and the present ownership status quo be maintained. Otherwise, if the proposed transactions were consummated and if the Commission later decided that the ruling of its board of one Commissioner was in error, the restoration of the status quo would be virtually impossible. One of the assignors, Mr. Langill, wishes completely to withdraw from broadcasting and to re-invest his funds in an entirely new enterprise. His removal from the Commission's jurisdiction by consummation of the assignments would render the reinstatement of the status quo most unlikely.

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Furthermore, the proposed 50 per cent owners of the assignee, Mr. and Mrs. Noga, would provide all the funds required to carry out the proposed construction of the KBLU television station. After the consummation of the assignment and after the urgent expenditure of the funds furnished by the Nogas, Mr. Crites' finances would prohibit a restoration of the status quo. In light of these facts, the extreme difficulty if not impossibility of restoring the status quo would render impotent any decision by the Commission, upon reconsideration, directing that the status quo be restored. Such decision would, of necessity, be one grounded upon the public interest. If it were thus frustrated, irreparable harm inimical to the interest and convenience of the public would clearly result.

4. The question of Valley's likelihood of success on the merits of its Petition for Reconsideration will have to be decided on that Petition. However, it seems expedient to point out two factors in this connection. First, many of the objections raised by Valley against the above applications, such as problems of programming, trafficking, tardiness and misrepresentations, flow from an analysis of these applications and not from facts submitted by Valley. Therefore, Valley urges that the full Commission may reach a conclusion opposite to that of its board of one Commissioner from the same indis-

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putable facts already in evidence. Secondly, the allegation of irreparable economic injury contained in Valley's petitions directed against these applications were geared to standards of pleading deemed sufficient by the Commission at the time of their filing. The Petition for Reconsideration will meet the new standards for pleading an "economic protest" which were recently announced.

5. It should also be stressed that a stay of the Commission's mandate would not affect an existing service. In fact, in light of KBLU-TV's pending application for increase of power and other changes, on which application no action has been taken to date, the issuance of stay would not substantially alter any plans for the construction or for the establishment of the proposed new station.

WHEREFORE, it is requested that the Commission grant the relief hereinabove requested or such other and further relief as it deems appropriate under the circumstances.

Respectfully submitted,
Valley Telecasting Co., Inc.

By: /s/ Reed Miller

/s/ Thomas G. Fisher
Arnold, Fortas & Porter

* * *

Its Attorneys

Dated: August 30, 1963

[Certificate of Service]

[R. 175]

[Rec'd September 9, 1963 - FCC]

[R. 176]

PETITION FOR RECONSIDERATION

1. Valley Telecasting Co., Inc., licensee of Television Station KIVA, Yuma, Arizona, a petitioner in the above-captioned matters (hereinafter "Valley", "KIVA" or "petitioner") pursuant to Section 405 of the Communications Act of 1934, as amended, (47 U.S.C. §405, 75 Stat. 422), Section 1.84 of the Commission's Rules and Regulations, (47 C.F.R. §1.84), respectfully petitions that the action of the Commission, announced in its Memorandum Opinion and Order (FCC 65-785), released August 9, 1963, (hereinafter "Order"), granting the above-captioned applications without hearing, be reconsidered, set aside, rescinded and vacated, and that the above-captioned applications be designated for hearing on the issues raised by Valley's previous petition to deny these applications and

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by its motions to consolidate. In support of this petition, Valley assigns the following errors in the Commission's above-mentioned decision:

I. THE COMMISSION ERRED IN RULING THAT A
CARROLL-TYPE HEARING WAS NOT REQUIRED
ON THE SUBJECT APPLICATIONS

2. While in its petitions and motions requesting that the above-captioned applications be denied, Valley relied on several grounds, Valley's principal argument was that the market in which Station KBLU-TV is to be established cannot sustain an additional television facility. Valley submitted that the destructive economic injury caused by the establishment of KBLU-TV or of any other additional station would ultimately deprive the public of the service it now enjoys. However, in Paragraphs 5 and 6 of the decision, the Commission rejected Valley's economic arguments and held, in essence, that Valley failed

to plead a prima facie case which would require a hearing under Carroll Broadcasting Company v. Federal Communications Commission. ^{1/} Valley respectfully submits that the Commission's refusal to designate the above-captioned applications for hearing on appropriate "Carroll issues" was in error, requiring reconsideration for the following reasons:

- (a) The pleadings of Valley were sufficient under the Carroll decision to justify a hearing.

3. It is submitted that Valley achieved, and probably surpassed, the standards of pleading required by the Carroll case. In Carroll, the Court stated: ^{2/}

^{1/} 103 U.S. App. D.C. 346, 258 F.2d 440, 17 RR 2066 (1958).

^{2/} 258 F.2d at 443.

We hold that, when an existing licensee offers to prove that the economic effect of another station would be detrimental to the public interest, the Commission should afford an opportunity for the presentation of such proof and, if the evidence is substantial (i.e. if the protestant does not fail entirely to meet his burden), should make a finding or findings. (Emphasis supplied)

4. Valley, the existing licensee of Station KIVA-TV, made several offers to prove that the economic effect of another station within the KIVA-TV coverage area would be detrimental to the public interest. In its petitions to deny Valley alleged, in substance, that because of its maximum facility, vigorous sales policy, triple network affiliation and its status as the only station serving the Yuma-El Centro area, KIVA-TV was in an excellent position completely to exhaust the television revenue potential of the area; that it has, in fact, taken full advantage, consistent with the public interest, of this ostensibly advantageous

position; that, despite these advantages, KIVA, after having suffered serious losses for several years, has scarcely been able to do better than break even; that, therefore, it can be reasonably concluded that there are no substantial television revenues available within KIVA-TV's coverage area beyond the revenues which KIVA-TV realizes; that each of the applicants for new television stations within the KIVA-TV service area stated a minimum revenue figure which such stations must realize in order to survive; that should any one of these new stations realize even a sizeable fraction of its estimated revenue needs, which for KBLU-TV would be \$90,000, most of such revenues would, of necessity, be carved out of KIVA-TV's current revenue sources; that even the slightest diversion of KIVA-TV's current revenues would render KIVA-TV a loss operation; that should KIVA-TV be rendered a loss operation as a result of permanent

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economic competition by a new station, KIVA-TV could not reasonably expect to recoup its losses and become a self-sustaining operation within the foreseeable future; that, as a result, KIVA-TV's incentive for staying on the air would be removed and it would be forced, first, in order temporarily to survive, to impair its programming services, and, ultimately, to go out of business and off the air; that KIVA's demise, even if its service were partially replaced by a new television service, would deprive large areas and important segments of the population of its only existing television service, because none of the new proposals would cover the same area as KIVA-TV. Upon these allegations and premises, Valley concluded that the demise of KIVA alone would be a loss detrimental to the interests of the public. Furthermore, KIVA expressed its grave doubts that KBLU-TV, which because of its much smaller service area would not have the same broad revenue sources as KIVA-TV, would be able financially to sustain its operation for very long and predicted that, ultimately, the entire area would be totally

deprived of all television service, while Yuma would be deprived of its only transmission facility, -- a result clearly contrary to the public interest. The above allegations were supported with facts and figures taken from KIVA-TV's actual experience in the market and offer was made to adduce the detailed evidentiary facts, supporting the proposed conclusion, in a "Carroll hearing".

5. In its motion to consolidate and responsive pleadings, KIVA-TV, proceeding from the above logic, further concluded that while the destructive economic impact of any one of the new stations would result in the predicted disaster, the combined economic impact of the three new stations, i.e., KBLU-TV in Yuma

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and the two new applicants for El Centro, would not only be destructive to KIVA-TV and to the public interest but that the new stations would also destroy one another, thereby compounding the catastrophe. KIVA warned against the danger of viewing the three applications separately, without evaluating their impact upon each other. It pointed out that since the additional \$90,000 needed by KBLU-TV was not available in Yuma, the additional \$347,000 required by the three new stations combined was even less available from the Yuma-El Centro market area. The facts recited in the above pleadings were supported by affidavits.

6. KIVA's recital of facts amply supported the ultimate conclusions urged by it. As the Commission's decision points out, in offering to prove the destructive economic effect which any new station in Yuma-El Centro would have on the public interest, KIVA advanced only the above-detailed principal chain of reasoning and did not detail alternative arguments based on other economic indicators. However, in responsive pleadings KIVA did assert that alternative arguments based on retail sales or population figures, upon which the new Yuma and El Centro permittees relied in their efforts to refute Valley's contention, supported Valley's rather than its opponents' theory. ^{1/}

7. There is nothing in the Carroll decision which requires an economic protest to consider the detailed evidentiary facts of all possible alternative economic theories. Nor can the prima facie theory of a case be defeated by allegations of collateral facts upon which the complaint did not rely. Such a rule would be

1/ As will be later demonstrated, a detailed analysis of a multitude of economic factors, whether studied alone or in combination, including an analysis of the factors which Valley's opponents suggested as the more significant, leads to the same inescapable conclusion urged by Valley in its original petitions and motions.

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inconsistent with ordinary requirements for pleading. As long as the facts recited by the complainant, if admitted as true, support the conclusions urged, and as long as the conclusions allege destructive economic harm inimical to the public interest, a hearing is required under Carroll. If alternative arguments advanced by the applicant reach conclusions different from the prima facie allegations of protestant, the applicant has, in effect, joined issue on triable facts. Moreover, as indicated above, Valley offered to show that even the additional facts relied upon by its opponents supported Valley's case. In this Petition for Reconsideration, Valley repeats this offer.

8. It is further submitted that in the current controversy as to the degree of specificity required in pleadings to raise a Carroll issue, the Commission has arbitrarily and capriciously changed the rules. And while in Missouri-Illinois Broadcasting Co. (KZIM), FCC 63-650 (1963), it states that a petitioner is not required to plead his evidence, the Order complained of here indicates that the Commission now requires a petitioner to plead his evidence or to adhere to a degree of proof so strict as to amount to the same thing.

9. No such requirements were enunciated by the Court in Carroll, supra. In fact, the Court there recognized that the burden of proof in a

hearing was substantial and that many petitioners might be unable to meet it. Yes, the Court directed the Commission to provide an opportunity for the presentation of such proof where an offer was made by an existing licensee. Significantly, the protestant in the Carroll case "did not cast its

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proffer of proof in terms of the public interest, or at least not in terms of the whole public interest." (258 F.2d at 444) Despite such deficiency in the pleading, the Court remanded the case for a hearing on the economic issue. It is clear that in its offer of proof Valley has exceeded the degree of particularity which was held in Carroll properly to raise the economic question.

10. Nor have prior Commission's precedents, decided under Carroll, required this new higher degree of specificity in pleadings. Thus, in Geoffrey A. Lapping, 23 RR 919 (1962), Bigbee Broadcasting Co., 24 RR 497 (1962), John Self, 24 RR 1177 (1963), and Rhineland Television Cable Corp., 24 RR 1181 (1963), on which cases Valley relied, the degree of specificity required of the protestants was far less than that required of Valley. See also, Haggard & Rogers, 24 RR 670 (1962), and Brush Broadcasting Company, FCC 63-52 (1963), recited in Commissioner Cox's dissent to the decision in Missouri-Illinois Broadcasting Company (KZIM), FCC 63-650 (1963), released on July 29, 1963. Indeed, the Commission's Order in the instant cases and in Missouri-Illinois Broadcasting Company, supra, constitute the promulgation of new rules of pleading, in violation of the Administrative Procedure Act, 60 Stat. 237, 5 USC 1001 et seq., and in direct contravention of the Court's decision in Carroll, supra.^{1/} Therefore, Valley cannot properly be held to these new standards of pleading, which were not announced at the time its protest was filed, and which were not lawfully promulgated. However, as shown below, the information that is

^{1/} See also Sunbeam Television Corporation v. Federal Communications Commission, 100 U.S. App. D.C. 82, 243 F.2d 26 (1957) wherein the Court held that it was reversible error for the Commission to depart from or fail to apply established policy which was reflected in its reported decisions.

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available for introduction in an evidentiary hearing, and which Valley could have inserted in its pleading had it been informed of this new requirement, satisfies even these unheralded and arbitrary standards.

- (b) The pleadings of Valley raised substantial questions of public importance warranting further inquiry by the Commission which would have uncovered further facts, in amplification of those originally presented by Valley, in justification of a Carroll hearing.

11. The courts have consistently held that a complaint must be given the benefit of every possible implication and should not be dismissed unless it appears certain that the plaintiff would not be entitled to relief under any theory which the facts offered to be proved would support. Lack of detail in the complaint is not ground for dismissal and all facts well pleaded must be admitted and accepted as true. Machado v. McGrath, 90 U.S. App. D.C. 70, 193 F.2d 706, cert. den. 342 U.S. 948; Harris v. United States, 204 F. Supp. 228 (D.C. Mass. 1962). Moreover, the Commission, being an administrative agency charged with the service of the interest of the public, and empowered with fact-finding powers beyond those of the courts in private controversies, is restricted from using the "technical demurrer approach" in pleadings which raise questions relating to the public, rather than private interest. Thus, in Clarksburg Publishing Company v. Federal Communications Commission, considering the Commission's denial of a protest of a grant without hearing, the court said: ^{1/}

The statute [Communications Act] contemplates that, in

appropriate cases, the Commission's inquiry will well extend beyond matters alleged in the protest in order to reach any issue which may be relevant in determining the legality of the challenged grant.

^{1/} 96 U.S. App. D.C. 211, 215, 225 F.2d 511, 515.

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Clearly, then, the inquiry cannot be limited to the facts alleged in the protest where the Commission has reason to believe, either from the protest or its own files, that a full evidentiary hearing may develop other relevant information not in the possession of the protestant. Here . . . the Commission had ample reason for extending the inquiry. Nevertheless, by adopting the technical demurrer approach, it precluded such development and confined itself to a consideration of the facts and issues set forth in the protest. However unwittingly, the Commission seems to have assumed the defense of its grant, rather than the public interest, as its primary role in the proceedings.

Under this language, even the conduct of an investigation in the field may become the duty of the Commission. However, in the instant case, a mere informal request to petitioner to amplify its factual statements would have brought forth the detailed evidentiary facts which the Commission now seems to require. Had the Commission fulfilled its duty under the Clarksburg case, it would have discovered an ample supply of detailed economic evidentiary facts in support of the ultimate facts and conclusions pleaded by Valley.

- (c) A preliminary, but detailed, expert economic analysis of the potential of the Yuma- El Centro market area and of Valley's operation therein clearly establishes the validity of Valley's petitions to deny and motions to consolidate.

12. Faced with the new standards of pleading a prima facie case of destructive economic competition contrary to the public interest, as promulgated in the instant decision, Valley has caused to be prepared, at considerable expense and effort, an expert economic study of the television revenue potential of the Yuma-El Centro area and the extent to which KIVA has exhausted that potential. To conduct the study and analysis Valley retained

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the services of a noted economist, Dr. Irston R. Barnes, former professor of economics and other business courses at Yale and Columbia Universities, former Consulting Economist in the Anti-trust Division of the Department of Justice, former Director of the Economic Bureau of the Civil Aeronautics Board and Economic Adviser to the Board, and former Chief of the Division of Economic Evidence and Reports of the Federal Trade Commission and Economic Adviser to the Bureau of Litigation of that Commission. Dr. Barnes is now a private economic consultant.

13. Dr. Barnes' economic analysis of the service area of KIVA, entitled "Opportunities for Competition in Television Operations in the Southern Arizona-California Border Region", is attached hereto. It contains a host of evidentiary facts which would have been presented by KIVA in support of its prima facie case in its petitions to deny and motions to consolidate had the necessity for particularity of this character been made known by the Commission prior to its ruling herein. ^{1/}

14. Many of the facts contained in the Barnes Analysis are what KIVA would consider evidentiary facts and which it would normally expect to present in evidence in the hearing room. On the other hand,

even the detailed Barnes Analysis does not purport to constitute a complete economic study of the market potential. If given the opportunity to do so in a Carroll type hearing, Valley will introduce further detailed economic evidence to support its position and the conclusions of the Barnes Analysis.

^{1/} In any event, the facts developed by the Barnes Analysis are of such importance to the public interest in the Yuma-El Centro area as to require their consideration by the Commission pursuant to Rule 1.84(c)(3).

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15. The Barnes study, attached hereto, includes analyses of the economics of competition in television generally, of the television service areas in the Southern Arizona-California border region, of the general characteristics of the KIVA service area and of the economy and growth potential of that region, of a comparison of KIVA's operations and service area with the experience of other stations in other markets in the broadcast industry, and of the prospective impact of competition on television services in Yuma and Imperial Counties. Based upon these analyses, the Barnes study concludes that:

The authorization at the present time of an additional television station in the Yuma-El Centro market foreshadows such revenue inadequacies as to impair the quality and jeopardize the availability of television services to the public. (Page 4)

16. The above conclusion rests upon the amply documented and carefully researched facts that because of the limited water resources of the area, no substantial further agricultural expansion is possible, although the economy of the area relies chiefly upon agriculture; that measured mostly in terms of population, households, retail sales, and net effective buying income, the KIVA coverage area compares very unfavorably with other multi-station markets; that the small business

character of the market discourages local advertising; that the economic trends expressed in percentages are misleading because of the small original base of comparison. Moreover, the study shows that the potential of agriculture, mining, manufacturing, wholesale and retail trade, finance and government activities in the KIVA service area promises no more than a modest rate of economic growth. Further, Dr. Barnes' study of KIVA's business operations reaffirms KIVA's claim for high efficiency in

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exploiting the revenue potential of the market, although KIVA fails to realize the revenues which comparable stations can obtain or comparable markets can furnish.

17. Based upon these facts and upon the reasonably predictable effects of competition, the Barnes Analysis concludes that the Yuma-El Centro market will be unable to support one additional station for perhaps five or ten years from the present. (See attached Barnes Analysis, pp. 4, 123) Moreover, the study discloses that the advent of a second station in the Yuma-El Centro area will inevitably result in substantial diversions of revenue from KIVA's presently thin earnings. According to Dr. Barnes, these diversions from KIVA's revenues would range from approximately \$160,000 to \$259,589 annually depending upon whether there is two or three station competition in the market. (Barnes Analysis, p. 119). He predicts that KIVA would become a deficit operation within the first year of competitive operation and that diversions of revenue "of the magnitude predicted would almost inevitably foreshadow the disappearance of KIVA from telecasting." (Barnes Analysis, pp. 119-120). The Barnes Analysis concludes, (p. 123), that:

The operation of two television stations in the Yuma-El Centro market will, it appears, produce deficit operations for the next five years, at least. The operations of three or four stations will certainly involve large losses for all stations for the foreseeable future.

18. The consequences of economic damage of this magnitude would clearly force KIVA off the air. As Dr. Barnes points out, at page 120 of his report, if KIVA were to survive at all, for even a temporary period, it could do so only at the expense of curtailing local programming, depriving the area of oppor-

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tunities for community use of its facilities and, in general, by degrading its service to the public.

- (d) The substitution of the service of KBLU-TV or that of either of the El Centro permittees for the service of KIVA would result in serious and harmful losses of service to the public.

19. That a substitution of the service from any one of the three newly authorized stations for the existing service of KIVA would be seriously harmful to the public is demonstrated by the attached engineering statement of Howard Head, of A.D. Ring & Associates, Consulting Engineers. ^{1/}

20. First, it is clear that no matter which new station survives, if KIVA ceases operations, the public in the Yuma-El Centro area would lose an existing service of long standing upon which it has come to rely. The loss would affect 38,984 persons in the present KIVA Grade A contour and 97,460 persons in KIVA's present Grade B contour.

21. Second, the engineering statement demonstrates that if KBLU-TV were to replace the KIVA operation, while portions of the area now served by KIVA would receive substituted service from KBLU-TV, a serious degradation of existing service would occur if KBLU-TV, operating as presently authorized, is the survivor. Thus, while Yuma would retain a local transmission facility, 8211 persons would lose a Grade A or better service and 60,465 persons would lose a Grade B or better service. This results from the much smaller area which would be served by KBLU-TV than is presently served by KIVA. Since KIVA's

present Grade A coverage encompasses

1/ The detailed facts contained in the attached engineering report are, once again, evidentiary facts in support of Valley's allegations in its petitions to deny and motions to consolidate which Valley would have produced previously had the Commission given advance notice of the new standards for pleading which it adopted in the instant case. Moreover, under the compelling circumstances of this case, both the Barnes Analysis and the attached engineering statement should clearly be accepted and considered by the Commission under Rule 1.84(c)(3) as facts bearing materially upon the public interest.

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only 38,984 persons, a loss of 8,211 is substantial, representing over 21% of the persons now receiving Grade A service from KIVA. Similarly, since the KIVA Grade B coverage includes a population of only 97,460, a loss of 60,465 persons represents a loss of approximately two-thirds of those now served, -- a loss of monumental magnitude.

22. With KBLU-TV operating as proposed, the loss picture is still substantial. Under the proposed KBLU-TV operation, 4,334 out of 38,984 persons presently served by KIVA (i.e., over 11% of those now served) would lose a Grade A or better service, while 59,220 out of 97,460 persons presently served by KIVA (again almost two-thirds of those now served) would lose a Grade B or better service. Losses of this magnitude are indeed substantial and cannot be condoned.

23. Further, it should be emphasized that if KBLU-TV is the survivor, the population centers of El Centro, Brawley, and other communities in the Imperial Valley would lose their only existing reception service. Moreover, since KIVA now maintains an auxiliary studio in El Centro, and since KBLU-TV not only does not propose to do so, but will not even reach El Centro with a Grade B signal, El Centro will lose the only local outlet for self-expression it now has.

24. Thus, it is clear that if KBLU-TV is the surviving station, service to the public will be seriously and substantially degraded and

impaired to an extent which could not possibly be justified under any public interest standards.

25. Let us now examine the results if one of the El Centro permittees, KXO-TV or KECC-TV, should be the surviving station. If KXO-TV survives, the attached engineering statement demonstrates that 38,344 of the 38,984 persons now receiving a

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Grade A or better service from KIVA would lose such service. This shocking loss results from the fact that Yuma would be deprived of its only existing transmission facility, KIVA. There would be no replacement of a local outlet in Yuma. Instead, Yuma would be reduced to a fringe Grade B reception service from KXO-TV located in El Centro. In this connection, it is significant to note that, unlike KIVA's existing operation, KXO-TV does not even propose an auxiliary studio in Yuma. Moreover, the KXO-TV operation would result in a Grade B loss in the Yuma area affecting 5,986 persons.

26. It is, of course, true that KXO-TV would gain a new Grade A service to 59,505 persons in the California area most of whom now receive Grade B service from KIVA. However, this gain can only be achieved by taking away the only existing Grade A or better service from 38,344 persons in the Yuma area and by deleting from Yuma its only and long-existing outlet for local self-expression, the existing KIVA station.

27. Similarly, if KECC-TV should be the surviving facility, the attached engineering statement shows that 38,281 of the 38,984 persons now receiving a Grade A or better service from KIVA would lose that service. As in the case of KXO-TV, Yuma would be deprived of its only transmission facility with no replacement thereof by KECC-TV even in the form of an auxiliary studio. Instead, Yuma and the Yuma area would receive only a fringe Grade B reception service from KECC-TV in place of the city grade and Grade A service it now receives from

its long-existing local outlet, KIVA. Again, while 65,789 persons in the area of California to be served by KECC-TV would gain a Grade A or better signal from KECC-TV (most of whom now receive Grade B service from KIVA), this can be accomplished only at the

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tremendous and patently unwarranted expense of depriving Yuma of its existing local station and taking away a city grade to Grade A service from 38,281 persons in the Yuma area.

28. It should be emphasized that the area now served by KIVA and the areas proposed to be served by KBLU-TV, KXO-TV and KECC-TV do not now receive service from any United States television station other than KIVA. Thus, any areas and populations which will lose KIVA's service and which will not have such lost service replaced by the signals of KBLU-TV, KXO-TV or KECC-TV will be converted into "white" areas with no television service.

29. Petitioner cannot conceive that the Commission could justify, on public interest grounds, the deletion of an existing local station of long standing and the only Grade A or better service in one community in order to provide a new local station and a new Grade A service in another community of roughly comparable size where the latter already receives Grade B service from the existing station and enjoys a local outlet service via an existing auxiliary studio. Should the Commission condone such a situation, it is clear that it would do so only at the expense of serious degradation and deprivation of existing service to substantial numbers of the public now served by KIVA -- a result obviously in contravention of the public interest.

(e) The public interest required a Carroll hearing on the Commission's own motion, irrespective of Valley's rights.

30. The Communications Act requires that the Commission grant applications only if the public interest, convenience, and necessity would be served by such grant. In charging the Commis-

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sion with making this public interest determination, the Congress did not confine the Commission's powers to the consideration of facts properly brought to its attention by third parties. ^{1/} Thus, while KIVA's own standing and private interests may be affected by its strict compliance with the procedural rules set forth in the Act and in the Commission's Rules, the Commission's duty to grant the above applications only if the public interest is served by their grant does not depend on possible cut-off dates, rules of pleading, and other procedural requirements which may be applicable to Valley. The Commission is not entitled to make grants contrary to the public interest on grounds that there may be some deficiency in Valley's pleadings.

31. Therefore, Valley agrees with the Commission that the procedural problems allegedly present in Valley's pleadings and recited in its Order should not bar the Commission from considering these cases on their merits. And it vigorously opposes any suggestion that the Commission's determination on the merits should be influenced at all by possible procedural defects in Valley's pleadings. Thus, while it does not admit to defects in its pleadings, it is Valley's alternative position that, regardless of the manner in which the fact that the establishment of an additional station in Yuma or in El Centro would be contrary to the public interest was brought to the Commission's attention, it was the duty of the Commission to consider and dispose of such information before granting applications for the establishment of such new facilities.

^{1/} Cf. Clarksburg Publishing Company v. Federal Communications Commission, supra.

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32. In advancing this contention, Valley does not suggest, nor did the Court in Carroll suggest, that it is "incumbent upon the Commission to evaluate the probable economic results of each license grant." (258 F.2d at 444). Valley's contention is merely confined to the circumstances of the instant and related cases, where the Commission knew or should have known, before the mischief was done, that serious economic problems beset the KIVA coverage area and that Valley had offered to prove that the grant of the new authorizations would be detrimental to the public interest.

33. In this connection, the Commission's Order is deficient because it fails to mention Valley's Petition to Deny the application of The New England Industries, Incorporated, for a permit to construct a new television station in Yuma, Arizona. The New England Industries, Incorporated, applied for the same facility for which KBLU-TV subsequently applied. Valley's petition to deny the New England application was filed on December 5, 1961. That petition, which was incorporated by reference in the petitions filed against the above-captioned applications, set forth the same facts, conclusions and arguments which are further amplified by the instant petition, and requested a Carroll hearing under the same issues.

34. After the Desert Telecasting Company filed a competing application for the same channel, Valley withdrew its petition to deny the application of The New England Industries, Incorporated, stating that the comparative hearing necessitated by the Ashbacker case would not be concluded in the foreseeable future and that it was difficult to predict what the economic circumstances would be at the time of the final grant to one or

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the other applicant. However, in this pleading, filed on January 30,

1962, Valley reiterated that, as of then, Yuma was unable to support another television station.

35. Shortly thereafter, and with economic inadequacy of the Yuma-El Centro area having been clearly asserted, the Commission granted a construction permit not only to KBLU-TV but to two additional stations in El Centro. All of the three stations would operate within or serve portions of the area within the Grade B contour of Station KIVA-TV.

36. Under these circumstances, and the circumstances set forth above in this petition, the Commission cannot justify its action either by claiming ignorance of matters pleaded by Valley at the time of the grant, or by pointing to possible procedural problems in Valley's subsequent pleadings.

37. It should be further emphasized that neither the above-captioned facilities, nor the two El Centro stations have been built to date. Therefore, the Commission is in error when it refers to KBLU-TV as an existing facility, and intimates that the question here is merely whether or not an existing station should change hands. At the moment, KBLU-TV is nothing more than a paper authorization to construct a future facility. Therefore, reconsideration either on the basis of this petition, or on the Commission's own motion, would still prevent the full impact of the impending disaster which would result by the construction of any of the new facilities within KIVA's coverage area. The attached Barnes Analysis clearly demonstrates that regardless of whether or not KIVA has done everything within its power to protect its private interests from the imminent doom, the Commission must protect the public from the effects of the "kamikaze

action" stubbornly insisted upon by the new applicants. As the Court stated in Carroll: ^{1/}

The broadcast industry is a competitive one, but competitive effects may under some sets of circumstances produce detriment to the public interest. When that happens, the public interest controls.

**II. THE COMMISSION'S GRANT OF THE APPLICATIONS
WAS IN VIOLATION OF ITS OWN POLICY AND
RULES WITH REGARD TO TRAFFICKING, MISREPRE-
SENTATIONS, LACK OF DILIGENCE, SHOWING
REQUIRED FOR EXTENSION OF CONSTRUCTION
TIME, WAIVER OF THE "THREE-YEAR RULE",
AND PROGRAMMING REQUIREMENTS**

38. Valley also requests that the Commission reconsider its rulings on the non-economic arguments advanced by Valley's petitions to deny. The disposition of the Board of one Commissioner, or his failure to dispose of the facts recited by Valley, which showed that the applicants herein are guilty of trafficking and other improprieties, constituted reversible error. For the reasons set forth in the original petitions, these rulings should be reconsidered. Without repeating the detailed arguments contained in previous pleadings, Valley hereby summarizes only the most flagrant errors:

39. In Oregon Radio, Inc., 26 FCC 197, 16 RR 1023 (1959), the Commission held that an applicant may not, in requesting extension of construction time, recite that it will build if a contingency occurs and thereby make the contingency a condition precedent to its already existing obligation to construct. The Commission's acceptance of KBLU's statement that it would commence construction only if and when the assignment application is granted, therefore, violates the ruling of the above decision. Moreover, KBLU's excuse does not constitute a cause

^{1/} 258 F. 2d at 443.

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consider these programming problems in the framework of a hearing. Moreover, should the rules proposed in that docket be promulgated, the economic argument, discussed supra, would be further strengthened.

III. CONCLUSION

44. The attached Barnes Analysis and engineering statement clearly demonstrate the validity of Valley's contentions that the Yuma-El Centro area cannot support a second television station and that the advent of competitive service will adversely affect the public interest. The threatened damage to the public is so clear-cut, so imminent and of such irreparable character as to compel the conclusion that the Commission should reconsider and reverse its prior action.

45. Moreover, because of the serious nature of the threatened harm to the public interest it is most important that the prior action be reconsidered by the full Commission. The decision here complained of was taken by one Commissioner, the Chairman, acting as a Board in the absence of the other six Commissioners. The public interest in the Yuma-El Centro area requires that such action be reviewed and reconsidered by the full Commission.

WHEREFORE, it is requested that the Commission grant the relief hereinabove requested and such other and further relief as may be proper under the circumstances.

Respectfully submitted,

Valley Telecasting Co., Inc.

By: /s/ Paul A. Porter
Paul A. Porter

* * * * *

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OPPORTUNITIES FOR COMPETITION IN TELEVISION OPERATIONS
IN THE SOUTHERN ARIZONA-CALIFORNIA BORDER REGION

**An Economic Analysis of the Service Area
of Television Station KIVA**

**Prepared for Valley Telecasting Company
Yuma, Arizona**

By

Irston R. Barnes

**With the Assistance of the Staff of
National Economic Research Associates, Inc.**

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IRSTON R. BARNES
Economic Consultant
Antitrust And Government Regulation

I, Irston R. Barnes, am an Economic Consultant with offices at 58 North Branford Road, Wallingford, Connecticut, and at 80 Pine Street, New York, New York.

I am a graduate of Yale College, 1926, with a major in economics, and of The Graduate School of Yale University in 1928 with a Ph. D. in economics. I also attended selected courses at the Yale School of Law, 1929 to 1931.

I served as an Instructor and Assistant Professor of Political Economy at Yale University, 1938-1941, teaching Public Control of Business, Economic Principles, Economics Honors, Transportation and Accounting in Yale College, and Antitrust and Trade Regulation and Public Utility Regulation in The Graduate School. From 1960 to 1963, I was a Professor of Political Economy in the Graduate School of Business, Columbia University, teaching Conceptual Foundations of Business, Business Institutions, and Government Regulation of Business. I have also taught, part-time, at George Washington University, Albertus Magnus College (New Haven), and the American Institute of Banking.

From 1941 to 1944, I served as Consulting Economist in the Antitrust Division of the Department of Justice, participating in the preparation and trial of cases, performing economic studies, testifying as an expert witness, and coordinating the presentation of testimony before Congressional committees. From 1944 to 1948, I was the Director of the Economic Bureau (1944-45) at the Civil Aeronautics Board and Economic Adviser to the Board (1945-48), directing various phases of the Board's economic work and participating in the presentation and analysis of formal cases, particularly route certification and rate cases. From 1948 to 1960, I was at the Federal Trade Commission in several positions, including Chief of the Division of Economic Evidence and

Reports and Economic Adviser to the Bureau of Litigation, directing and participating in the preparation of economic studies and reports, developing and directing the preparation of economic evidence for litigated cases, and testifying as an expert government witness.

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Since 1960 I have served as a Consultant to the New York State Office of Transportation; as economic consultant to Lever Brothers Company, preparing economic data and testifying as an expert witness in an antitrust proceeding; and as an economic consultant in other anti-trust and regulatory matters.

My publications include Public Utility Control in Massachusetts (Yale 1930), Cases on Public Utility Regulation (Crofts 1938), and The Economics of Public Utility Regulation (Crofts 1942). I have also had numerous articles published on regulation and antitrust subjects in legal and economic journals.

I have been retained by Valley Telecasting Company, Inc., licensee of television station KIVA, Yuma, Arizona, to prepare a study and analysis of the competitive television situation in the Southern Arizona-California area and particularly in and about the service area of Station KIVA.

The attached study was prepared by me and under my supervision with the assistance of the staff of National Economic Research Associates, Inc. The matters and facts set forth therein are, to the best of my knowledge and belief, true and correct.

/s/ Irston R. Barnes

Subscribed and sworn to before me this 5th day of September, 1963.

/s/ Marguerite E. O'Brien
Notary Public, D.C.

My commission expires: April 14, 1966

* * * * *

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SUMMARY AND CONCLUSIONS

The present investigation is based upon an analysis of public information with respect to the television industry, supplemented by an inquiry into the nature of KIVA's operations and the essential characters of its market area. The market area investigation involved in examination of prior studies of the area, an analysis of principal economic indicators available with respect to the region, and an on-the-spot survey of the economic features of Imperial and Yuma counties. It has not been based upon an exhaustive study of the economy of the southern Arizona-California border region; there are many other relevant economic facts which could be assembled and analyzed. However, it is believed that the present study reveals in proper prospective the essential economic attributes of the region.

The economy of Imperial and Yuma counties rests upon a foundation of irrigated agriculture. It is a prosperous region which has grown rapidly in the past, but which has largely expended its capacity for growth with the exhaustion of the water resources available to it. No future substantial expansion in agriculture can be anticipated.

The market for television services, and particularly for television advertising may be measured in terms of population,

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households, retail sales, net effective buying income and possibly other measures. The present analysis has relied largely upon the four factors enumerated.

A serious hazard in evaluating the economic potential of the region lies in the high percentage rates of growth shown by various economic indicators, particularly for the postwar years. Percentages and trends must not conceal the fact that the absolute magnitudes involved --

population, retail sales or income -- are relatively small. In comparison with other markets, the southern Arizona-California border region is not, for television advertisers, "must buy"; it is a largely marginal market. The trends and percentages of the postwar years do not provide a basis upon which future economic expansion at past rates can be predicated.

Yuma and El Centro counties are preponderantly small business communities, which makes it exceedingly difficult to generate a significant volume of local advertising to support local television.

An examination of the growth experience and current positions in agriculture, mining, manufacturing, wholesale and retail trade, finance, and government activities provide no basis for projecting a more than modest rate of growth for the foreseeable future.

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There are opportunities to develop the resort potential of the region and to attract additional manufacturing, but past experience and present prospects give no indication that substantial early growth is to be expected in these areas.

The economic characteristics of the Yuma-El Centro market are compared with the economic indicators for 82 television markets served by three or more television stations. These economic indicators do not indicate that the Yuma-El Centro region qualifies for inclusion in the three-station market category.

The Yuma-El Centro region was analyzed in relation to television markets having comparable populations or households. Most of these were one-station markets, or the second station was a satellite.

The revenue and expense experience of KIVA was analyzed in relation to the experience of stations of comparable market and revenue size. KIVA has been less successful than most stations in its class in developing advertising revenues from networks or from local

sources. Its lower earnings from all sources, emphasize the limited economic potential of its market to support television operations.

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The failure of KIVA's expense experience to conform to the experience of stations in its category reflects the necessity of economizing imposed by its limited revenues.

A review of all of KIVA's advertising accounts for a recent year and a survey of potential advertisers as disclosed by the classified telephone directories indicates that KIVA has diligently exploited the revenue possibilities of its market but that it has encountered increasing difficulty in sustaining the earnings of the two preceding years.

An analysis of the prospective effects of competition upon time rates, advertising volume, and broadcast revenues indicates that the Yuma-El Centro market cannot support competing television operations in the years immediately ahead, but that a continuation of growth at the modest rates which are anticipated may provide the basis for the successful operation of a second television station within perhaps five to ten years. In view of the character of the estimated revenue requirements for the newly authorized stations, it is not possible to express a more precise judgment.

The authorization at the present time of an additional television station in the Yuma-El Centro market foreshadows such revenue inadequacies as to impair the quality and jeopardize the availability of television services to the public.

II. TELEVISION SERVICE AREAS IN THE SOUTHERN ARIZONA-CALIFORNIA BORDER REGION

The border region served by television station KTVA, operating on Channel 11, includes Yuma County, Arizona, with most of the population concentrated in the city of Yuma and with smaller numbers in Somerton, Imperial County, California, with El Centro as the principal city, but with significant populations also at Brawley, Calexico, Imperial and Holtville, and a portion of Riverside County, California.¹

Two new television stations have been authorized for El Centro, California: KXO-TV has been granted a construction permit for Channel 7, and Tele-Broadcasters of California, Inc. has been granted a construction permit for Channel 9. Both would place a Grade B signal over Yuma but over very little of Yuma County. If KBLU-TV is permitted to build, Yuma will receive service from four stations while El Centro and the Imperial Valley will receive service from three stations. Portions of Yuma County would be served by four stations, while other, larger portions, would be served by two stations.

¹The population reached in Mexico is ignored for the purposes of this economic study.

state, is constructing a new office at the corner of Fourth Avenue and 16th Street that will be a striking advertisement in itself, a circular building, half glass below at street side and half glass above at the rear.

The residential areas of Yuma and other communities in the area are bright and attractive, with predominantly small one-story houses on rather narrow lots. The maintenance of an attractive garden and green lawn requires regular watering, and adjacent houses may show a fine lawn and a barren, sandy yard. Figure 13 shows a typical residential street -- 24th Place in Mesa Manor, Yuma. Figure 14 shows a fine residential area on Eighth Avenue at Sixth Street.

Both the Imperial Valley and the Yuma Valley are monuments to the achievement of man in irrigating a harsh and inhospitable desert; both areas maintain themselves against the constant pressure of desert conditions only by their access to life-giving water.

The pictures here presented of El Centro and Yuma are not simply descriptive of community life; they are evidence of the small business character of the

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economy. In small compact communities, such as Yuma and El Centro, business houses have little need to advertise -- their mere presence makes them known to virtually everyone who lives in the community or who comes to the community to shop. Their most effective advertisement is to make themselves conspicuous, and this they do with large signs and bright lights. If they advertise otherwise, they are making use of a prestige symbol, in effect asserting that they are prepared to conduct business in the manner of their counterparts in larger cities.

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for the future, noting that Yuma's climate and soil structure will "grow anything." Yuma's geographic position athwart arteries of east-west travel and trade was found to be a sustaining factor in the economy. It was noted that Yuma's economy is not ideally balanced, but "deliberate, planned and specific community encouragement and support" for manufacturing was recommended. After noting that "predictions are notoriously hazardous," the report resorted to a straight-line projection of Yuma County's population trend from 1950 to 1953 to forecast a population of 60,000 by 1958 and 75,000 by 1960. The actual population of Yuma County in 1960 was 46,235 (Table 1).

TABLE 1

POPULATION DATA: IMPERIAL AND YUMA COUNTIES AND THEIR
PRINCIPAL CITIES, 1940, 1950 and 1960

	<u>1940</u>	<u>1950</u>	<u>1960</u>
Imperial County	59,740	62,512	72,105
El Centro	10,017	12,590	16,811
Brawley	11,718	11,922	12,703
Calexico	5,415	6,443	7,992
Holtville	1,772	2,472	3,080
Yuma County	19,326	28,006	46,235
Yuma	5,325	9,145	23,974

Source: U.S. Department of Commerce, Bureau of the Census, County and City Data Book.

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county population of 53,000. The Stanford Research Institute's predictions are not to be confirmed by events.

The optimistic predictions for Imperial Valley and for Yuma Valley reflect the boom psychology of Southern California and of Arizona generally. The Arizona Statistical Review for 1962, prepared by the Research Department of Valley National Bank, assembles a series of seven indices of growth, which show Arizona leading the nation in population growth, income growth, non-agricultural employment manufacturing employment, agricultural income, bank deposits and life insurance. This picture for Arizona is dominated by the phenomenal growth of Phoenix and Maricopa County and of Tuscon and Pima County, which together accounted for 70 percent of the State's population in 1960 and nearly 83 percent of the state's growth between 1950 and 1960. While Yuma County grew from 28,600 in 1950 to 46,235 in 1960, or 62 percent, the percentage rate of growth is far less significant than the actual population in estimating the economic potential for television services in the region.

In summary, any solid estimate of the economic potential of the Southern Arizona-California border

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region must be based, not upon trends and percentages, but upon attained levels of economic activity or upon growth so imminent that its character can be specifically identified. Television operations must live on present income rather than future prospects. Additional television services can be quickly constructed and promptly placed in operation as rapidly as higher levels of economic activity justify. There is no necessity to provide such facilities as instruments of growth, and the premature inauguration of additional television service may result in an impairment in existing services to the detriment of the public interest.

2. Population Growth

The essential population data for Imperial and Yuma Counties and for their respective cities for the three census years 1940, 1950 and 1960 is presented in Table 1. Imperial County experienced a population gain of 12,365 or of 20.7 percent from 1940 to 1960. Yuma County grew from 19,326 in 1940 to 46,235 in 1960, a gain of 26,909 or of 139.2 percent. Again, it may be noted that the actual population figures are more relevant than the percentages, which merely indicate that

TABLE 2

YUMA COUNTY, ARIZONA & IMPERIAL COUNTY, CALIFORNIA
SOURCES OF INCOME AND EMPLOYMENT
1950 and 1960^a

	Imperial County, Cal.			Yuma County, Ariz.			Yuma and Imperial Counties		
	1950 ^a	1960 ^a	1950-1960 ^a	1950 ^a	1960 ^a	1950-1960 ^a	1950 ^a	1960 ^a	1950-1960 ^a
Population	62,975	72,105	+ 14.5 %	28,006	46,235	+ 65.1 %	90,981	118,340	+ 30.1 %
Civilian Labor Force	25,395	29,867	+ 17.6	10,972	17,374	+ 58.3	36,367	47,241	+ 29.2
Unemployed (%)		6.2			4.6				
Male (%)	84.0	76.4		83.4	73.2		83.8	75.2	
Employed Persons	23,117	28,027	+ 21.2	10,370	16,571	+ 59.8	33,487	44,598	+ 33.2
Agriculture	8,471	10,881	+ 28.4	2,763	4,093	+ 48.1	11,234	14,974	+ 33.3
Construction	1,223	963	- 21.3	1,114	1,165	+ 4.6	2,337	2,128	- 8.9
Manufacturing	1,426	1,560	+ 9.4	364	556	+ 52.7	1,790	2,116	+ 18.2
Durable		507			177			684	
Nondurable		1,053			379			1,432	
Transportation, Communication, other Public Utilities	2,150	2,181	+ 1.4	1,489	1,810	+ 21.6	3,639	3,991	+ 9.7
Wholesale & Retail Trade	4,816	5,008	+ 4.0	2,379 ^c	3,335	+ 40.2 ^f		8,343	
Finance, Insurance & Real Estate	367	557	+ 51.8	163	493	+ 202.5	530	1,050	+ 98.1
Government	2,373	3,651	+ 53.9	1,581	2,958	+ 87.1	3,954	6,609	+ 67.1
Value Added by Manufacture (Adjusted) - \$000	16,339 ^d	13,686 ^b	- 16.2 ^e	2,306 ^d	3,410 ^b	+ 47.9 ^e	18,645 ^d	17,096 ^b	- 8.3 ^e
Retail Trade - Sales - \$000	96,152 ^d	109,445 ^b	+ 13.8 ^e	49,668 ^d	64,016 ^b	+ 28.9 ^e	145,820 ^d	173,461 ^b	+ 19.0 ^e
Wholesale Trade Sales - \$000	49,618 ^d	110,595 ^b	+ 122.9 ^e	14,725 ^d	36,917 ^b	+ 150.7 ^e	64,343 ^d	147,512 ^b	+ 129.3 ^e
Selected Services - Receipts - \$000	8,416 ^d	10,097 ^b	+ 20.0 ^e	6,187 ^d	8,734 ^b	+ 41.2 ^e	14,603 ^d	18,831 ^b	+ 29.0 ^e
Value of Farm Products Sold - \$000	109,387 ^d	170,446 ^c	+ 55.8 ^f	36,032 ^d	55,227 ^c	+ 53.5 ^f	145,419 ^d	225,673 ^c	+ 55.2 ^f

a Unless otherwise noted.

b 1958

c 1959

d 1954

e 1954-1958

f 1954-1959

Source: U.S. Dept. of Commerce, Bureau of the Census, County and City Data Book, 1952, 1956, 1962, and General Economic Characteristics, 1950 & 1960.



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acres.¹ Beyond this increment, there appears to be little opportunity for overall expansion in agriculture.

It is notable that the proposed Pacific Southwest Water Plan recently announced by Secretary of the Interior Stewart L. Udall and providing for the long-term development of the water resources of the five-state area (Arizona, California, Nevada, New Mexico and Utah) specifically states that no significant expansion in irrigated acreage is contemplated:

"There is not enough water available to the region at economic cost to provide for an expansion of irrigated acreage, except on Indian reservations and limited areas having local water supplies available. However, because of the importance of agriculture to the region, a major objective is to augment the water supplies to maintain irrigated agriculture as close as possible to present levels." (The New York Times, Western Edition, August 27, 1963.)

With natural advantages of fertile soil, controlled moisture and endless sunshine, Imperial and Yuma Valleys are able to concentrate on high-yield, high-value crops. There may be further shifts in the pattern of production in the

¹Guide for Preliminary Evaluation of Yuma, Arizona.

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this sector of the local economy that would generate additional revenues for television advertising.

6. Government Services

Government employment in Imperial County was 3,651 in 1960, an increase of 53.9 percent over the decade. In Yuma County government employment of 2,957 in 1960 represented an 87.1 percent increase. This growth in government activity has already made its influence felt in the expansion of retail trade and other economic indexes already noted.

An addition to the economic and cultural life of Yuma will be provided by Arizona Western College, a junior college which will open with an estimated 400 students in the fall of 1963. The establishment of the college will make an indeterminate addition to the volume of trade and service expenditures in Yuma, for it will bring not only faculty but students' families to the region for visits. Local merchants will benefit both from the student and faculty expenditures and from the expenditures of their visitors. However, this increment to the economy of Yuma will not, it is anticipated, provide any direct additional revenue sources for the local television,

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will use television advertising. So far the results have been most disappointing.

11. Summary of Economic Prospects

The southern Arizona-California border region will continue to grow, but the strong impetus to growth in the expansion of irrigated agriculture in the Imperial and Yuma Valleys has been largely expended. There is no prospect that large new acreages will be brought under new irrigation and cultivation. There will, of course, be changes in the pattern of agriculture, and these changes may be expected to yield somewhat larger and more stable incomes, but it is not to be expected that the agricultural segment of the economy will support any significant growth in population. Indeed, the contrary is more likely--with changes in patterns of cultivation and increased mechanization, agricultural production in the two valleys will probably be sustained with a smaller labor force.

It would be unsafe to predict a continued growth of wholesale trade at the rate recorded for the past decade. It may be anticipated that retail services may be continued to expand at the modest rate characteristic of the past twelve years. In particular, it may be anticipated that transient

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tourist traffic through Yuma will continue to expand, and that Yuma's strategic position will enable it to benefit from providing services to tourists. There is no reason why the Yuma region should not become a more popular winter resort area, but it is not possible to predict if, or when, this will come about. The present use of the Yuma area by winter residents, who largely supply their own accommodations in the form of trailers and mobile homes and who spend on a minimal basis, has not, and will not, lead to any notable expansion in the economy of the region, even if their numbers increase substantially.

The establishment of Western Arizona College, a junior college at Yuma, represents a net gain for the economy; but this is the only recent change in the pattern of governmental activity in the region which has added significantly to the breadth and depth of economic activity. Increases in governmental activity in any region come in the form of discrete changes, one-time actions, which cannot be expected to occur with a continuity that permits predicting a growth in the economy on this basis.

Construction keeps pace, by and large, with growth in population and in general with economic activity. As previously

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noted, it may be expected that population growth will continue, but at a slower rate than has characterized the past decade, and that with the absence of any definable expansion in other areas of the economy, construction will continue to be a responsive, rather than an initiatory and stimulating, factor in the economy.

With respect to manufacturing, municipal officials and the chambers of commerce will continue actively seeking to attract new industry. There are already located in the region a number of processing plants preparing agricultural products for the market. To the limited extent to which the agricultural products of the valleys require further processing, it may be expected that new plants will be located in the region. In a sense,

the growth in feed-lots and the increase in the number of cattle and live-stock imported into the region to be finished for marketing represents a processing of the hay, grain and forage crops which the region produces; and like the processing of any other agricultural crop, this adds to the strength and depth of the local economy. As for manufacturing which is unrelated to the agricultural production of the region and which is not concerned with supplying products for local consumption, it must be anticipated that the southern Arizona-California border region will continue to have difficulty in

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competition with other areas. The success of Phoenix and Tucson in attracting new manufacturing enterprises is not an argument that Yuma and El Centro can do likewise; indeed, the developments which have already taken place in Maricopa and Pima counties exert a strong "magnetic force" drawing new industries to that region in preference to the southern border region which cannot supply the services and institutions, cultural advantages, and the many intangibles that make a community a good place in which to live. There is no identifiable prospect for any expansion in manufacturing activity which would strengthen the economy of the region.

The growth in finance, insurance, and real estate activities during the 1950's is indicative that the communities of Imperial and Yuma counties have reached a stage where these specialized services are being supplied by local enterprises or by branch operations of larger organizations. With respect to finance and insurance, most communities, except the very largest, are in a quasi-satellite position. This will continue to be true of the southern Arizona-California region. Growth in finance, insurance, and related activities reflects the growth of economy generally. It cannot be expected to be self-starting and self-sufficient in stimulating further growth in the economy.

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In summary, the prospect is for a continued modest growth in the economy of the KIVA service area. There are opportunities for significant discrete additions to the economy of the region by attracting new industrial enterprises, but such expansion is not in early prospect and cannot be identified as to its nature or predicted with respect to time.

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TV Market	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
	Number Of TV Stations	Standard Metropolitan Area ^a				Per Capita Retail Sales (4) ÷ (2)	Broadcast Revenues	Household Per TV Station (000) (3) ÷ (1)	Income Per TV Station (000) (5) ÷ (1)	Broadcast Revenue Per TV Station (7) ÷ (1)
		Population	Households	Retail	Net Effective					
		(000)	(000)	Sales (\$000)	Buying Income (\$000)					
Yuma, Ariz. and Imperial, Calif.	(3)	121.2	32.0	\$ 196,204	\$ 210,412	1,619	\$ 380,179	(10.7)	\$ (70,137)	\$ (126,726)
Albany-Schenectady-Troy, N.Y.	3	670.5	207.3	861,016	1,443,063	1,285	5,897,602	69.1	481,021	1,965,867
Albuquerque, N.M.	3	286.9	78.4	351,711	545,771	1,226	1,952,120	26.1	181,923	650,706
Amarillo, Tex.	3	159.7	46.7	245,762	337,110	1,539	2,011,166	15.6	112,370	670,388
Atlanta, Ga.	3	1,073.3	307.1	1,382,520	2,143,513	1,288	7,325,837	102.4	714,504	2,441,945
Bakersfield, Calif.	3	303.5	89.0	425,027	568,680	1,403	1,704,557	29.7	189,560	568,185
Baltimore, Md.	3	1,793.3	502.6	2,008,299	3,670,104	1,120	9,937,761	167.5	1,223,368	3,312,587
Beaumont-Port Arthur, Tex.	3	318.3	92.4	348,463	584,195	1,096	1,529,297	30.8	194,731	509,765
Boston, Mass.	3	3,159.1	934.9	4,334,216	7,567,917	1,372	21,026,607	311.6	2,522,639	7,008,869
Buffalo-Niagara Falls, N.Y.	3	1,457.8	430.4	1,662,703	3,144,259	1,141	10,735,007	143.5	1,048,086	3,578,335
Cedar Rapids-Waterloo, Iowa	3	270.3	81.0	370,484	587,770	2,175	2,613,421	27.0	195,926	871,140
Charleston-Oak Hill-Huntington, W.Va.- Ashland, Ky.	4	516.9	150.0	565,590	939,959	1,818	4,105,533	37.5	234,989	1,026,383
Chattanooga, Tenn.	3	290.3	84.5	339,244	483,699	1,169	1,937,843	28.2	161,233	645,947
Chicago, Ill.	4	6,401.3	1,945.2	9,159,902	16,225,080	1,431	43,335,035	486.3	4,056,270	10,833,758
Cincinnati, Ohio	3	1,105.1	335.2	1,420,809	2,464,448	1,286	10,092,505	111.7	821,482	3,364,168
Cleveland, Ohio	3	1,856.6	554.4	2,548,780	4,469,012	1,373	17,251,387	184.8	1,489,670	5,750,462
Colorado Springs-Pueblo, Colo.	3	279.0	79.1	289,513	521,938	1,038	1,416,148	26.4	173,979	472,049
Columbia, S.C.	3	273.8	65.2	243,419	450,304	889	1,812,565	21.7	150,101	604,188
Columbus, Ohio	3	714.4	209.7	921,750	1,577,300	1,291	8,184,067	69.9	525,766	2,728,022
Dallas-Fort Worth, Tex.	4	1,748.1	533.4	2,444,748	3,700,833	1,399	10,955,801	133.4	925,208	2,738,950
Denver, Colo.	4	977.8	300.3	1,432,723	2,324,763	1,465	6,986,615	75.1	581,190	1,746,653
Des Moines-Ames, Iowa	3	301.0	94.0	450,298	705,264	1,496	3,705,838	31.3	235,088	1,235,279
Detroit, Mich.	3	3,886.8	1,111.2	4,778,988	8,310,152	1,230	17,986,762	370.4	2,770,050	5,995,587
El Paso, Tex.	3	334.9	83.4	368,919	525,296	1,105	1,818,622	27.8	175,098	606,207
Evansville, Ind.	3	200.7	61.2	233,049	352,517	1,161	2,003,198	20.4	117,505	667,732
Flint-Saginaw-Bay City, Mich.	3	701.7	196.3	809,877	1,280,861	1,155	3,003,780	65.4	426,953	1,001,260
Fort Wayne, Ind.	3	240.7	71.0	323,360	518,534	1,343	2,428,154	23.7	172,844	809,384
Fresno-Hanford-Visalia, Calif.	6 ^b	407.8	119.8	647,002	777,759	1,587	2,878,614	20.0	125,126	479,769
Green Bay, Wisc.	3	130.2	34.8	154,344	233,659	1,187	2,516,792	11.6	77,886	838,930

TABLE 5
(Continued)

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ECONOMIC INDICATORS FOR MARKETS WITH THREE OR MORE TV STATIONS, 1961

TV Market	(1) Number Of TV Stations	(2) Standard Metropolitan Area ^a				(6) Per Capita Retail Sales (4) ÷ (2)	(7) Broadcast Revenues	(8) Household Per TV Station (000) (3) ÷ (1)	(9) Income Per TV Station (\$000) (5) ÷ (1)	(10) Broadcast Revenue Per TV Station (7) ÷ (1)
		(2) Population (000)	(3) Households (000)	(4) Retail Sales (\$000)	(5) Net Effective Buying Income (\$000)					
Greenville-Spartanburg, S.C.-Asheville, N.C.	4	507.9	143.8	521,410	822,821	1,027	3,069,702	36.0	205,705	767,425
Harrisburg-Lancaster-York-Lebanon, Pa.	5	983.8	294.3	1,141,865	1,953,426	1,161	4,527,891	58.9	390,685	905,578
Hartford-New Haven-New Britain-Waterbury, Conn.	5	1,404.2	419.9	1,801,104	3,386,313	1,283	9,016,283	84.0	677,262	1,803,256
Honolulu, Hawaii	3	527.2	123.9	541,468	1,137,911	1,027	3,020,286	41.3	379,303	1,006,762
Houston-Galveston, Tex.	3	1,386.4	411.4	1,742,983	2,972,019	1,257	8,292,881	137.1	990,673	2,764,293
Indianapolis-Bloomington, Ind.	4	754.2	228.1	1,017,944	1,697,362	1,350	9,894,734	37.0	424,340	2,473,683
Johnstown-Altoona, Pa.	3	346.9	100.7	363,118	517,061	1,047	3,567,025	33.6	172,353	1,189,008
Kansas City, Mo.	3	1,104.4	350.8	1,643,817	2,587,436	1,488	8,976,145	116.9	862,478	2,992,048
Knoxville, Tenn.	3	375.2	109.1	380,126	615,431	1,013	2,573,932	36.4	205,143	857,977
Las Vegas-Henderson, Nev.	3	140.0	44.6	335,773	335,773	2,398	1,248,887	14.9	111,924	416,295
Little Rock, Ark.	3	251.1	74.0	287,085	452,966	1,143	2,432,357	24.7	150,988	810,785
Los Angeles, Calif.	7	7,137.9	2,340.4	10,455,103	18,606,215	1,465	45,232,265	334.3	2,658,030	6,461,752
Louisville, Ky.	3	751.3	218.2	832,408	1,411,782	1,108	5,795,810	72.7	470,594	1,931,936
Madison, Wisc.	3	231.3	66.2	293,099	505,573	1,269	2,088,215	22.1	168,524	696,071
Memphis, Tenn.	3	652.3	181.4	755,801	1,075,495	1,159	5,250,945	60.5	358,498	1,750,315
Miami, Fla.	3	1,015.7	334.0	1,457,023	2,079,672	1,435	9,319,282	111.3	693,224	3,106,427
Milwaukee, Wisc.	4	1,235.5	369.1	1,560,384	2,854,522	1,263	9,099,624	92.3	713,630	2,274,906
Minneapolis-St. Paul, Minn.	4	1,537.4	454.3	2,110,468	3,498,221	1,373	11,490,146	113.6	874,555	2,872,536
Mobile, Ala.-Pensacola, Fla.	3	386.4	104.1	474,714	589,752	1,230	2,672,315	34.7	196,584	890,771
Nashville, Tenn.	3	412.8	118.2	501,847	769,266	1,216	4,585,998	39.4	256,422	1,528,666
New Orleans, La.	3	903.8	263.1	1,047,389	1,609,653	1,164	6,177,260	87.7	536,551	2,059,086
New York, N.Y.	7	10,902.4	3,503.1	14,888,974	28,581,696	1,366	76,911,980	500.4	4,083,099	10,987,425
Norfolk-Portsmouth-Newport News-Hampton, Va.	3	839.2	221.9	787,622	1,569,665	939	4,476,330	74.0	523,221	1,492,110
Oklahoma City-Enid, Okla.	3	571.5	179.7	722,064	1,129,829	1,263	5,492,693	190.5	376,610	1,830,897
Omaha, Nebr.	3	474.1	141.6	576,630	1,097,808	1,216	4,805,780	47.2	365,936	1,601,926
Orlando-Daytona Beach, Fla.	3	389.1	119.5	518,106	311,743	1,332	2,446,953	39.8	103,914	815,651
Paducah, Ky.-Cape Girardeau, Mo.-Harrisburg, Ill.	3	92.8	29.7	127,791	167,456	1,377	1,795,525	9.9	55,818	598,508
Peoria, Ill.	3	295.3	89.7	371,521	623,385	1,258	2,359,955	29.9	207,795	786,651
Philadelphia, Pa.	4	4,464.6	1,299.6	5,398,205	10,035,442	1,209	25,839,186	324.9	2,508,860	6,459,796
Phoenix-Mesa, Ariz.	4	717.3	206.6	913,301	1,364,961	1,273	4,488,826	51.6	341,240	1,122,206

TABLE 5
(Continued)

ECONOMIC INDICATORS FOR MARKETS WITH THREE OR MORE TV STATIONS, 1961

TV Market	(1) Number Of TV Stations	(2) Population (000)	(3) Households (000)	(4) Standard Metropolitan Area ^a		(5) Net Effective Buying Income (\$000)	(6) Per Capita Retail Sales (4) ÷ (2)	(7) Broadcast Revenues	(8) Household Per TV Station (000) (3) + (1)	(9) Income Per TV Station (\$000) (5) + (1)	(10) Broadcast Revenue Per TV Station (7) + (1)
				Retail Sales (\$000)							
Pittsburgh, Pa.	3	2,449.7	721.4	2,766,296		5,086,453	1,129	16,013,596	240.5	1,695,484	5,337,865
Portland-Poland Springs, Me.	3	185.9	55.6	252,840		330,680	1,360	2,833,174	18.5	110,226	944,391
Portland, Ore.	3	842.9	275.4	1,093,426		1,825,806	1,297	6,487,605	91.8	608,602	2,162,535
Richmond-Petersburg, Va.	3	459.8	133.8	603,971		1,046,865	1,316	3,282,753	44.6	348,955	1,094,251
Roanoke-Lynchburg, Va.	3	276.8	78.9	313,076		531,600	1,131	2,755,246	26.3	177,200	918,415
Rochester, N.Y.	3	603.8	182.4	783,093		1,508,999	1,297	4,282,203	60.8	502,999	1,427,401
Rochester-Austin, Minn.-Mason City, Iowa	3	120.9	36.3	209,602		263,661	1,734	1,619,443	40.3	87,887	539,814
Sacramento-Stockton, Calif.	3	800.7	239.5	1,115,751		1,768,884	1,395	5,053,560	79.8	589,628	1,684,520
Salt Lake City-Ogden-Provo, Utah	4	557.1	154.4	703,648		1,049,288	1,263	3,908,637	38.6	262,322	977,159
San Antonio, Tex.	4	719.8	190.2	720,128		1,147,887	1,000	3,995,090	47.6	286,971	998,772
San Francisco-Oakland, Calif.	4	2,879.8	949.4	4,165,897		7,582,187	1,447	18,062,683	237.4	1,895,546	4,515,670
Seattle-Tacoma, Wash.	5	1,484.4	470.9	2,045,889		3,356,163	1,378	8,262,816	94.2	671,232	1,652,563
Shreveport, La.-Texarkana, Tex.	3	383.9	112.7	429,888		609,727	1,122	3,198,080	37.6	203,242	1,066,026
South Bend-Elkhart, Ind.	3	356.0	104.9	404,437		768,197	1,136	1,907,255	35.0	256,065	635,751
Spokane, Wash.	3	290.4	91.3	385,079		584,819	1,326	3,088,720	30.4	194,939	1,029,573
Springfield-Decatur-Champaign-Urbana-Danville, Ill.	3	506.3	154.8	661,260		1,039,272	1,306	3,565,300	51.6	346,424	1,188,433
St. Louis, Mo.	4	2,126.5	641.7	2,566,462		4,748,809	1,207	12,244,989	160.4	1,187,202	3,061,247
Tampa-St. Petersburg, Fla.	3	835.5	287.0	1,073,676		1,508,986	1,286	5,354,455	95.7	502,995	1,784,818
Tucson, Ariz.	3	286.7	83.5	366,286		534,460	1,281	1,876,847	27.8	178,153	625,615
Tulsa, Okla.	3	434.8	138.5	496,152		893,031	1,141	3,894,090	46.2	297,677	1,298,030
Washington, D.C.	4	2,098.1	617.5	3,104,262		5,772,585	1,480	12,891,939	154.4	1,443,146	3,222,984
Wichita-Hutchinson, Kans.	3	424.7	128.9	511,874		867,617	1,205	3,144,686	43.0	289,205	1,048,228
Wilkes Barre-Scranton, Pa.	3	291.6	88.2	376,061		487,274	1,290	3,040,036	29.4	162,425	1,013,345
Youngstown, Ohio	4	166.4	48.5	293,561		301,904	1,764	1,891,354	12.1	75,478	472,838

TABLE 5
(Continued)

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ECONOMIC INDICATORS FOR MARKETS WITH THREE OR MORE TV STATIONS, 1961

NOTES

a Cols. (2), (3), (4) and (5) and columns derived therefrom, (6), (8) and (9), contain data on a Standard Metropolitan Area basis. These are areas defined by the Federal Government using criteria of population, metropolitan attributes of the labor force, and criteria of integration relating to the extent of economic and social communication between central and outlying counties as described in Sales Management Survey of Buying Power. They are not necessarily the same as the "TV Market" listed by the Federal Communications Commission. The concept of Net Effective Buying Income, Col. (5), is what the Government calls "disposable personal income" -- income of individuals less all tax payments to federal, state and local governments. Where part of the TV market is not included in the primary market's Standard Metropolitan Area, data for the secondary area was added in separately either as a separate metropolitan area or, if not an SMA, on a city basis.

b Not all stations in this market operated a full year during 1961.

Source: TV market, number of stations (1) and broadcast revenues (7) data from Federal Communications Commission, "Final TV Broadcast Financial Data, 1961"; all other data from Sales Management Survey of Buying Power, June 10, 1962.



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Colorado, has one station -- KREX-TV at Grand Junction which operates a satellite station, KREY-TV, at Montrose. Minot, North Dakota, has two stations: KXMC-TV has an AM affiliate, KGJB; KMOT is a satellite of station KFYZ-TV of Bismarck, North Dakota. San Angelo, Texas, now has two stations: KCTV, which began operations in 1953, and KACB-TV, which began operations on February 8, 1962, as a satellite of KRBC-TV, Abilene, Texas.

In summary, an analysis of markets having populations comparable to the combined populations of Yuma and Imperial counties indicates that such markets are typically served by one television station. Of the four communities which have two television stations, the second station is a satellite in three of the four instances, and in the fourth it is operated in affiliation with a television station in a nearby community.

There are only five television markets having populations or other economic characteristics comparable in size to either Yuma County, or to Imperial County, considered separately. Table 5, Economic Indicators for Television Markets with Populations Comparable to Yuma County, Arizona, or Imperial County, California, presents data for these communities selected on the

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basis of the number of households. Two of the markets -- Glendive, Montana and Riverton, Wyoming -- are distinctly smaller; the other three are substantially larger in population but not in households. An examination of these data indicates that there are a few communities of comparable economic size to Yuma County or Imperial County, considered singly, which are supporting a television station. No information is available as to how successful these stations are, either in terms of programming or financial results.

TABLE 9

A COMPARISON OF KIVA'S REVENUE AND EXPENSE EXPERIENCE WITH OTHER TV STATIONS
SERVING MARKETS OF 100,000 to 250,000 POPULATION FOR THE YEARS
1958-1961

REVENUE AND EXPENSE ITEMS	ALL STATIONS			Typical Dollar Figures Col. 4	PROFIT-ONLY STATIONS		KIVA	
	Typical Dollar Figures Col. 1	Typical Percent Figures Col. 2	Middle 50% Range Col. 3		Typical Percent Figures Col. 5	Middle 50% Range Col. 6	Dollar Figures Col. 7	Percent Figures Col. 8
1958								
PROFIT MARGIN ^a		7.9%	0.3%-18.0%		11.6%	5.9%-22.7%		(21.4%)
TOTAL BROADCAST REVENUE ^b	\$615,800		\$485,400-\$ 886,100	\$654		\$533,600-\$ 969,500	\$325,556	
TOTAL TIME SALES	654,400	100.0%	494,200- 919,200	680	100.0%	509,600- 1,020,200	324,776	100.0%
From:								
Networks	177,300	27.1	110,600- 240,000	194	28.5	114,600- 241,500	36,266	11.2
National & Regional Advertisers	259,200	39.6	156,300- 408,200	264	38.8	179,500- 509,000	124,926	38.5
Local Advertisers	217,900	33.3	149,700- 298,900	222	32.7	161,300- 301,700	163,584	50.3
TOTAL BROADCAST EXPENSE	\$553,200	100.0%	\$459,300-\$ 759,300	\$546	100.0%	\$477,100-\$ 763,900	\$362,767	100.0%
From:								
Technical	104,500	18.9	68,700- 129,500	99	18.2	63,300- 130,500	66,451	18.3
Program	198,600	35.9	172,500- 261,300	200	36.6	172,800- 251,800	91,273	25.2
Selling ^c	71,400	12.9	48,600- 88,900	70	12.9	48,200- 89,800	71,623	19.7
General & Administrative	178,700	32.3	125,500- 260,400	176	32.3	124,400- 270,000	133,411	36.8
SELECTED EXPENSE ITEMS								
Total Salaries ^d	237,000		188,500- 295,100	236		190,200- 299,000	178,798	
Depreciation & Amortization	63,900		45,300- 97,400	67		44,300- 95,300	40,460	
Film Expenses	60,600		41,200- 86,100	55		40,100- 78,400	17,348	
PROFIT ^e (before Federal Income Tax)	\$ 48,800		\$ 1,500- 133,600	\$ 75		\$ 29,900- 164,700	\$(69,540)	
1959								
PROFIT MARGIN ^a		7.2%	(-1.0% loss)-13.7%		8.3%	7.0%-15.9%		(10.1%)
TOTAL BROADCAST REVENUE ^b	\$425,100		\$351,100-\$ 447,400	\$427		\$340,500-\$ 449,300	\$296,402	
TOTAL TIME SALES	416,500	100.0%	344,300- 479,300	429	100.0%	339,900- 481,700	302,567	100.0%
From:								
Networks	92,900	22.3	61,500- 122,800	93	21.8	59,400- 122,000	51,161	16.9
National & Regional Advertisers	150,400	36.1	118,700- 179,100	155	36.1	121,100- 191,700	126,249	41.7
Local Advertisers	173,300	41.6	143,600- 204,100	180	42.1	143,700- 198,900	125,159	41.4
TOTAL BROADCAST EXPENSE	\$396,600	100.0%	\$337,000-\$ 431,800	\$344	100.0%	\$304,800-\$ 402,600	\$294,944	100.0%
From:								
Technical	70,200	17.7	55,100- 82,400	62	18.1	52,700- 72,400	68,700	23.3
Program	161,800	40.8	119,300- 168,200	139	40.6	117,000- 163,000	93,612	31.7
Selling ^c	47,600	12.0	32,400- 55,000	40	11.6	29,700- 50,000	44,541	15.1
General & Administrative	117,000	29.5	91,100- 135,300	102	29.7	85,800- 119,600	88,091	29.9
SELECTED EXPENSE ITEMS								
Total Salaries ^d	157,000		137,000- 187,400	145		131,900- 161,700	136,883	
Depreciation & Amortization	43,000		33,300- 54,600	39		29,000- 44,100	34,732	
Film Expenses	42,000		25,000- 52,700	38		24,300- 51,600	26,605	
PROFIT ^e (before Federal Income Tax)	\$ 26,500		(-\$4,400 loss)-\$ 56,000	\$ 34		\$ 25,200-\$ 63,400	\$(30,216)	

TABLE 9
(Continued)

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A COMPARISON OF KIVA'S REVENUE AND EXPENSE EXPERIENCE WITH OTHER TV STATIONS
SERVING MARKETS OF 100,000 to 250,000 POPULATIONS, FOR THE YEARS
1958-1961

REVENUE AND EXPENSE ITEMS	ALL STATIONS			PROFIT-ONLY STATIONS			KIVA	
	Typical Dollar Figures Col. 1	Typical Percent Figures Col. 2	Middle 50% Range Col. 3	Typical Dollar Figures Col. 4	Typical Percent Figures Col. 5	Middle 50% Range Col. 6	Dollar Figures Col. 7	Percent Figures Col. 8
1960								
PROFIT MARGIN ^a		12.6%	5.7%-19.4%		14.1%	8.1%-21.2%		1.5%
TOTAL BROADCAST REVENUE ^b	\$718,200		\$486,600-\$1,085,300	\$731,800		\$581,200-\$1,117,300	\$351,623	
TOTAL TIME SALES	769,000	100.0%	532,800- 1,171,600	797,000	100.0%	589,400- 1,220,600	362,869	100.0%
From:								
Networks	206,900	26.9	130,200- 273,600	222,400	27.9	137,900- 286,000	63,757	17.6
National & Regional Advertisers	307,600	40.0	147,600- 508,300	317,200	39.8	181,500- 551,900	130,198	35.9
Local Advertisers	254,500	33.1	178,000- 350,200	257,400	32.3	193,500- 361,100	168,914	46.5
TOTAL BROADCAST EXPENSE	\$631,700	100.0%	\$461,200-\$ 821,700	\$640,600	100.0%	\$529,800-\$ 839,000	\$313,399	100.0%
From:								
Technical	103,600	16.4	74,500- 144,000	104,400	16.3	75,100- 145,800	60,429	19.3
Program	222,400	35.2	171,700- 307,500	231,900	36.2	176,000- 322,700	84,893	27.1
Selling ^c	87,800	13.9	55,600- 122,000	87,100	13.6	57,500- 124,600	62,053	19.8
General & Administrative	217,900	34.5	136,400- 276,100	217,200	33.9	150,900- 278,600	106,024	33.8
SELECTED EXPENSE ITEMS								
Total Salaries ^d	268,100		212,800- 371,900	284,300		220,400- 390,000	145,567	
Depreciation & Amortization	60,600		41,300- 86,300	60,800		41,700- 88,400	37,394	
Film Expenses	54,500		36,600- 83,900	58,500		37,000- 90,600	17,954	
PROFIT ^e (before Federal Income Tax)	\$ 88,700		\$ 28,300-\$ 186,100	\$104,700		\$ 50,500-\$ 202,500	\$ 5,303	
1961								
PROFIT MARGIN ^a		11.4%	2.7%-19.0%		13.1%	7.9%-21.4%		7.4%
TOTAL BROADCAST REVENUE ^b	\$733,300		\$542,500-\$1,075,800	\$791,200		\$604,900-\$1,133,000	\$306,805	
TOTAL TIME SALES	738,500	100.0%	555,700- 1,164,200	875,800	100.0%	619,400- 1,233,500	318,788	100.0%
From:								
Networks	225,200	30.5	162,000- 304,400	269,700	30.8	180,800- 337,300	85,238	26.7
National & Regional Advertisers	291,700	39.5	153,900- 489,100	358,200	40.9	186,400- 607,100	110,855	34.8
Local Advertisers	221,600	30.0	165,500- 322,500	247,900	28.3	175,900- 336,800	122,695	38.5
TOTAL BROADCAST EXPENSE	\$649,700	100.0%	\$479,700-\$ 893,300	\$687,600	100.0%	\$499,200-\$ 912,000	\$256,517	100.0%
From:								
Technical	109,200	16.8	76,500- 156,000	115,500	16.8	76,800- 156,500	55,223	21.5
Program	224,100	34.5	168,600- 315,100	242,700	35.3	170,000- 341,200	71,246	27.8
Selling ^c	87,100	13.4	60,400- 111,700	92,200	13.4	59,100- 117,200	45,051	17.6
General & Administrative	229,300	35.3	145,000- 284,200	237,200	34.5	154,700- 288,000	85,087	33.1
SELECTED EXPENSE ITEMS								
Total Salaries ^d	283,000		215,200- 381,700	285,700		220,600- 405,500	135,848	
Depreciation & Amortization	67,700		46,200- 93,500	69,300		47,600- 106,800	37,737	
Film Expenses	50,800		36,300- 93,800	51,400		35,100- 85,900	11,965	
PROFIT (before Federal Income Tax)	\$ 83,600		\$ 16,600-\$ 175,900	\$103,600		\$ 48,700-\$ 215,900	\$ 22,594	

a Derived from each station's gross profit divided by total revenue.

b Time sales plus incidental broadcast revenue minus agency and rep. comm. and payment to networks for sale of time.

c Includes all promotion; excludes agency and rep. comm.

d Total salaries and wages (including supervision) and all talent expense.

e Derived from each station's total expense subtracted from total revenue -- NOT line 7 subtracted from line 2.

Source: National Association of Broadcasters, Financial Report, Television, 1959; also 1960, 1961 and 1962.

TABLE 10

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A COMPARISON OF KIVA'S REVENUE AND EXPENSE EXPERIENCE WITH OTHER TV STATIONS HAVING REVENUES OF \$300,000 to \$500,000, FOR THE YEARS 1958-1961

REVENUE AND EXPENSE ITEMS	ALL STATIONS			PROFIT-ONLY STATIONS			KIVA	
	Typical Dollar Figures Col. 1	Typical Percent Figures Col. 2	Middle 50% Range Col. 3	Typical Dollar Figures Col. 4	Typical Percent Figures Col. 5	Middle 50% Range Col. 6	Dollar Figures Col. 7	Percent Figures Col. 8
<u>1958</u>								
PROFIT MARGIN ^a		4.0%	(-9.2% loss)-7.8%		6.8%	4.9%-13.3%		(21.4)%
TOTAL BROADCAST REVENUE ^b	\$409,100		\$344,200-\$ 471,200	\$410,700		\$362,800-\$ 447,000	\$325,556	
TOTAL TIME SALES	415,300	100.0%	354,100- 475,900	423,100	100.0%	357,700- 452,300	324,776	100.0%
From:								
Networks	104,600	25.2	52,300- 124,900	66,400	15.7	38,800- 120,100	36,266	11.2
National & Regional Advertisers	135,000	32.5	96,400- 171,300	142,600	33.7	110,300- 143,900	124,926	38.5
Local Advertisers	175,700	42.3	139,100- 217,300	214,100	50.6	149,300- 221,800	163,584	50.3
TOTAL BROADCAST EXPENSE	\$402,200	100.0%	\$356,600-\$ 458,500	\$366,200	100.0%	\$318,400-\$ 409,800	\$362,767	100.0%
From:								
Technical	66,400	16.5	54,400- 91,900	58,200	15.9	48,300- 63,800	66,451	18.3
Program	162,100	40.3	125,000- 188,100	147,200	40.2	115,400- 173,300	91,273	25.2
Selling ^c	46,600	11.6	37,000- 58,200	44,000	12.0	34,900- 57,300	71,623	19.7
General & Administrative	127,100	31.6	98,700- 169,700	116,800	31.9	92,500- 133,400	133,411	36.8
SELECTED EXPENSE ITEMS								
Total Salaries ^d	152,200		134,700- 200,000	142,700		128,400- 188,000	178,798	
Depreciation & Amortization	46,200		35,000- 62,100	44,400		34,100- 54,600	40,460	
Film Expenses	42,100		26,900- 65,100	31,700		19,800- 54,100	17,348	
PROFIT ^e (before Federal Income Tax)	\$ 18,100		(-\$46,000 loss)-\$ 31,300	\$ 26,900		\$ 19,500-\$ 49,100	\$(69,540)	
<u>1959</u>								
PROFIT MARGIN ^a		11.4%	5.4%-22.0%		12.7%	7.3%-23.9%		(10.1)%
TOTAL BROADCAST REVENUE ^b	\$698,900		\$571,100-\$ 979,200	\$714,000		\$584,600-\$ 994,600	\$296,402	
TOTAL TIME SALES	735,400	100.0%	552,700- 1,003,900	765,500	100.0%	594,300- 1,063,700	302,567	100.0%
From:								
Networks	201,500	27.4	129,000- 258,300	213,600	27.9	142,300- 263,900	51,161	16.9
National & Regional Advertisers	284,600	38.7	187,100- 494,200	304,700	39.8	211,500- 526,600	126,247	41.7
Local Advertisers	249,300	33.9	168,300- 326,700	247,300	32.3	184,100- 330,500	125,159	41.4
TOTAL BROADCAST EXPENSE	\$616,700	100.0%	\$509,500-\$ 782,400	\$617,300	100.0%	\$517,700-\$ 795,600	\$294,944	100.0%
From:								
Technical	104,800	17.0	77,200- 136,400	104,300	16.9	77,700- 139,000	68,700	23.3
Program	220,800	35.8	178,800- 282,100	223,500	36.2	176,700- 281,400	93,612	31.7
Selling ^c	76,500	12.4	54,600- 104,000	80,200	13.0	55,700- 103,000	44,541	15.1
General & Administrative	214,600	34.8	155,200- 276,500	209,300	33.9	161,400- 285,900	88,091	29.9
SELECTED EXPENSE ITEMS								
Total Salaries ^d	257,000		208,500- 335,000	258,700		214,600- 339,200	136,883	
Depreciation & Amortization	67,400		49,000- 97,500	71,200		49,200- 98,600	34,732	
Film Expenses	67,700		47,400- 93,700	65,900		47,000- 93,500	26,605	
PROFIT ^e (before Federal Income Tax)	\$ 81,300		\$ 22,500-\$ 177,800	\$109,900		\$ 44,800-\$ 200,700	\$(30,216)	

TABLE 10
(Continued)

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A COMPARISON OF KIVA'S REVENUE AND EXPENSE EXPERIENCE WITH OTHER TV
STATIONS HAVING REVENUES OF \$300,000 to \$500,000, FOR THE YEARS
1958-1961

REVENUE AND EXPENSE ITEMS	ALL STATIONS			PROFIT-ONLY STATIONS			KIVA	
	Typical Dollar Figures Col. 1	Typical Percent Figures Col. 2	Middle 50% Range Col. 3	Typical Dollar Figures Col. 4	Typical Percent Figures Col. 5	Middle 50% Range Col. 6	Dollar Figures Col. 7	Percent Figures Col. 8
<u>1960</u>								
PROFIT MARGIN ^a		5.9%	(-6.9% loss)-15.1%		12.7%	5.2%-16.8%		1.5%
TOTAL BROADCAST REVENUE ^b	\$430,800		\$341,200-\$ 465,600	\$448,100		\$363,200-\$ 472,700	\$351,623	
TOTAL TIME SALES	435,300	100.0%	362,900- 486,400	449,200	100.0%	367,400- 490,000	362,869	100.0%
From:								
Networks	107,500	24.7	70,500- 129,700	111,900	24.9	80,200- 131,300	63,757	17.6
National & Regional Advertisers	131,500	30.2	101,100- 164,900	137,000	30.5	97,500- 169,300	130,198	35.9
Local Advertisers	196,300	45.1	165,300- 242,600	200,300	44.6	165,500- 241,800	168,914	46.5
TOTAL BROADCAST EXPENSE	\$414,600	100.0%	\$346,300-\$ 447,500	\$374,800	100.0%	\$315,900-\$ 440,500	\$313,399	100.0%
From:								
Technical	75,400	18.2	55,000- 95,400	65,200	17.4	44,600- 77,100	60,429	19.3
Program	152,200	36.7	105,500- 181,800	139,800	37.3	102,400- 158,400	84,893	27.1
Selling ^c	54,700	13.2	34,200- 59,900	47,600	12.7	32,300- 54,500	62,053	19.8
General & Administrative	132,300	31.9	106,000- 142,500	122,200	32.6	106,500- 139,800	106,024	33.8
SELECTED EXPENSE ITEMS								
Total Salaries ^d	164,600		144,300- 197,600	157,700		144,300- 192,900	145,567	
Depreciation & Amortization	45,200		29,300- 56,600	45,200		27,200- 54,000	37,394	
Film Expenses	41,300		25,500- 51,700	38,200		19,200- 49,400	17,954	
PROFIT ^e (before Federal Income Tax)	\$ 22,100		(-\$28,800 loss)\$ 64,200	\$ 52,700		\$ 20,700-\$ 71,500	\$ 5,303	
<u>1961</u>								
PROFIT MARGIN ^a		6.0%	(-12.9% loss)-15.6%		12.4%	6.9%-20.6%		7.4%
TOTAL BROADCAST REVENUE ^b	\$414,300		\$346,600-\$ 455,200	\$436,900		\$368,300-\$ 461,900	\$306,805	
TOTAL TIME SALES	439,500	100.0%	361,600- 487,100	475,500	100.0%	366,000- 495,700	318,788	100.0%
From:								
Networks	125,300	28.5	102,200- 155,500	139,800	29.4	107,200- 165,100	85,238	26.7
National & Regional Advertisers	142,400	32.4	89,200- 167,800	164,000	34.5	102,500- 197,100	110,855	34.8
Local Advertisers	171,800	39.1	129,700- 184,700	171,700	36.1	128,000- 184,000	122,695	38.5
TOTAL BROADCAST EXPENSE	\$389,400	100.0%	\$338,000-\$ 433,700	\$382,700	100.0%	\$307,500-\$ 412,200	\$256,517	100.0%
From:								
Technical	71,300	18.3	58,500- 99,200	69,700	18.2	54,100- 72,600	55,223	21.5
Program	135,900	34.9	95,300- 160,900	143,100	37.4	92,700- 143,000	71,246	27.8
Selling ^c	50,200	12.9	30,100- 64,100	39,000	10.2	28,700- 58,800	45,051	17.6
General & Administrative	132,000	33.9	106,100- 152,700	130,900	34.2	84,200- 145,000	85,087	33.1
SELECTED EXPENSE ITEMS								
Total Salaries ^d	167,200		132,200- 208,800	142,500		132,100- 181,200	135,848	
Depreciation & Amortization	46,900		37,700- 63,200	39,600		34,200- 53,300	37,737	
Film Expenses	33,200		20,300- 46,500	27,900		19,700- 41,400	11,965	
PROFIT (before Federal Income Tax)	\$ 24,900		(-\$52,500 loss)-\$ 61,500	\$ 54,200		\$ 23,900-\$ 89,800	\$ 22,594	

a Derived from each station's gross profit divided by total revenue.

b Time sales plus incidental broadcast revenue minus agency and rep. comm. and payment for sale of time.

c Includes all promotion; excludes agency and rep. comm.

d Total salaries and wages (including supervision) and all talent expense.

e Derived from each station's total expense subtracted from total revenue -- NOT line 7 subtracted from line 2.

Source: National Association of Broadcasters, Financial Report, Television, 1959; also 1960, 1961 and 1962.



standards prescribed for the station; they must have approved equipment and the required number of engineers on duty where designated. Selling expenses are cut at the peril of losing essential advertising revenues on which the entire operation depends. KIVA originally attempted to maintain its studio at its transmitter, 8 miles west of Yuma in the desert. When television was new to the community, KIVA had little difficulty in inducing people to come to the desert studio to participate in live programs. As the novelty wore off, KIVA found it necessary to move its main studio into the city of Yuma, which increased both general and administrative expenses and technical expenses.

This analysis would indicate that KIVA has operated efficiently and economically and that both in its overall expenditures and with respect to the itemized categories, it has been a restrained and efficient operation. The relatively low level of programming expense is an indication of the financial difficulties which have confronted KIVA. The public interest would be served

if KIVA's income were adequate to permit more liberal expenditures for programming.

4. An Examination of KIVA's Advertising Experience

The extent to which KIVA has exploited the revenue opportunities in its market cannot be determined solely on the basis of a comparison of KIVA's experiences with the experiences of other television stations serving markets of comparable size or with other television stations receiving commensurate revenues. To be fully satisfied that KIVA has developed the revenue potentials available to it, two further analyses have been made: The first relates to the network revenues accruing to KIVA, and the second is concerned with KIVA's other advertising accounts.

Table 11, Sources of Network Revenue Received by KIVA for Fiscal Years Ending March 31, 1959 to 1963, shows steady progress in developing network revenues. The most interesting aspect of KIVA's experience, however, is the extent to which it has received revenues from all three national networks, not only from NBC, which has been its "primary" affiliation, but also from CBS and ABC. Indeed, in 1962, revenues from ABC exceeded revenues received from NBC.

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TABLE 11

SOURCES OF NETWORK REVENUES RECEIVED BY KIVA FOR FISCAL YEARS ENDING MARCH 31, 1959 to 1963

	<u>1959</u>	<u>1960</u>	<u>1961</u>	<u>1962</u>	<u>1963</u>
A B C	\$ 4,517	\$10,068	\$24,290	\$39,662	\$ 38,787
C B S	18,841	17,077	17,859	18,368	25,748
N B C	14,592	26,902	24,457	34,656	41,526
Total	\$37,950	\$54,047	\$69,606	\$92,686	\$106,081

Source: Valley Telecasting Company, Statements of Income and Expenses.

Having affiliate relations with all three national networks, KIVA has been able not only to provide its audience with a choice of the best network programs available on all three networks -- it has sought to have the ten best shows at all times --, but it has also been able to choose programs which are fully ordered by the sponsors. Thus, if a program on NBC which has alternate sponsors on successive weeks is ordered for KIVA by only one sponsor, KIVA may find an equally satisfactory CBS program where all of the sponsors have ordered KIVA and where its revenues are consequently larger.

KIVA has thus been able to develop the full revenue potential

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available from its network affiliations. Inasmuch as it has not, in the period under consideration, had to divide its coverage of Imperial and Yuma counties with competing stations, it has enjoyed higher network rates than would be available to a single station operating in competition with other stations in the area.

A similar conclusion is warranted with respect to national and regional advertising accounts. As the sole station operating in its market area, KIVA has been able to offer national and regional advertisers complete coverage of the market and to earn rates which reflect that favored position.

A detailed analysis of the specific advertising accounts making use of KIVA's facilities during the years 1960, 1961, and 1962 is presented in Appendix A. This is the most important evidence developed with respect to the opportunities for competition in television operations in the El Centro-Yuma market. It deserves careful study. Every account is tabulated, the magnitude of the account is indicated by

* * * * *

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TABLE 15

**ESTIMATES OF REVENUE REQUIREMENTS AND REVENUES AVAILABLE
TO TELEVISION STATIONS LICENSED FOR OPERATIONS
AT EL CENTRO AND YUMA**

Estimates of revenue requirements:

KBLU-TV	\$ 90,000
Tele-Broadcasters	130,000
KXO-TV	127,000
KIVA (actual 1962 operating income, less profits before federal income tax)	376,191
	<u>\$ 723,191</u>

**ACTUAL KIVA REVENUES FOR YEAR ENDING MARCH 31, 1962,
COMPARED WITH ESTIMATES OF REVENUES AVAILABLE
WITH THE OPERATION OF THREE OR FOUR
STATIONS, OR TWO STATIONS**

	<u>KIVA Actual</u>	<u>Three/Four Station Estimate</u>	<u>Two Station Estimate</u>
Networks	\$ 106,081	\$ 88,401	\$ 119,341
National and Regional	150,927	176,082	188,659
Local	<u>142,530</u>	<u>155,365</u>	<u>156,783</u>
	\$ 399,538	\$ 419,858	\$ 464,783

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**3. Prospective Competitive Diversions
of Revenues for KIVA**

With the operations of two or more TV stations in the Yuma-El Centro Market, KIVA will suffer substantial revenue losses. In the year ending March 31, 1963, KIVA received \$106,081 in network revenues, of which \$41,526 were derived from NBC and \$64,565 from CBS and ABC. With the authorization of additional stations, CBS and ABC have already canceled their affiliation contracts with KIVA. If the network revenue available to three or four stations of \$88,401 is divided among three stations equally, KIVA would have \$29,467; if network revenues of \$119,349 were divided among two stations, KIVA's network revenues would be \$59,671 (Table 15).

If KIVA were one of three stations sharing national and regional advertising revenues of \$176,082, it might expect to receive \$58,694. If it were one of two stations, it might expect national and regional advertising in the amount of \$94,330. Both sums should be compared with its actual revenues of \$150,927 for the year under consideration.

From local advertising sources, KIVA, as one of three stations, might expect to receive \$51,788 in advertising revenues; as one of two stations, it might expect to receive \$78,392; these figures must be contrasted with revenues of \$142,530, which were actually received.

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Under the assumptions postulated, KIVA would suffer revenue diversions of \$167,145 if there is two-station competition in the El Centro-Yuma market. If there is three-station competition, the diversion might be as much as \$259,589. Diversions of these magnitudes would probably not occur during the first year of operations but substantial diversions should certainly occur in that year, probably of sufficient magnitude to wipe out the \$40,625 profits before federal income taxes which were earned in 1962 and to encroach seriously upon the appropriation for depreciation and amortization, which was \$36,568 in 1962. Inevitably, KIVA would become a deficit operation in the first year in which there was either two-station or three-station competition.

No inference that profits in television operations are not in the public interest should be drawn from this analysis of prospective revenue diversions from KIVA. Modest profits in television are certainly in the public interest, as are liberal provisions for depreciation and amortization. In the long run, capital to provide the best attainable service will be forthcoming only if investments in television can earn profits commensurate with the risks involved, and certainly the risks involved in competitive television are not insubstantial. Adequate provisions for depreciation and amortization are essential

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in an industry where rapid technological changes, of which the coming of color television is only one recent example, offer opportunities for enhancing the value of television to the public.

Diversions of the magnitude predicted would almost inevitably foreshadow the disappearance of KIVA from telecasting. Before it disappeared from the scene, KIVA would be compelled to change the character of its operations, curtailing expenditures for local programming, depriving the community of the use of television as a means of supporting and developing community activities; if it were to survive, it would be forced to

sacrifice good programming for earnings, even where the public interest would dictate the continuation of popular programs.

4. Indicated Adequacy of Advertising Revenues in the
Yuma-El Centro Market in Relation to Revenue
Requirements for Two or More Stations

The newly authorized television stations for Imperial Yuma counties have submitted various estimates of their revenue requirements in conjunction with their applications. These are listed in Table 15, "Estimates of Revenue Requirements and Revenue Available to Television Stations Licensed for Operations at El Centro and Yuma." To these estimates have been added

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KIVA's actual 1962 income, less profit before federal income tax. The total revenue requirements for the four stations thus become \$723,191.

An attempt was made to determine whether KIVA's operating expenses were susceptible of significant reduction. The comparison of KIVA's operations with those of other stations of comparable market size and receiving comparable revenue as previously analyzed, has revealed that KIVA's expenditures were not excessive in relation to industry norms. Specific inquiry was made with respect to salary expenditures, and this disclosed what appeared to be a disproportionate expense for technical costs. However, further investigation disclosed that the increase in expense reflected an increase from twelve to eighteen in the hours of operation and the necessity of having engineers on duty at the transmitter, which is located 8 miles west of Yuma in the desert, and also at both the El Centro and Yuma studios. No evidence was developed which showed that KIVA's expenses were inflated. As of August 27, 1963, KIVA's staff consisted of the following positions:

General Manager	1
Program director and 3 announcers	4
Chief engineer, 6 full-time engineers and 1 part-time engineer	7-1/2
El Centro studio:	
Manager, 1 engineer and 3 sales- men announcers	5
Sales manager, 2 salesmen	3

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Chief accountant, 1 bookkeeper	2
Cameraman	1
Traffic manager	1
Secretary and commercial traffic manager	1
Film editor	1
Artist	1
Receptionist	1
Janitor	1
	<hr/>
Total staff	29-1/2

There is every prospect that KIVA will find the revenue potential of its market sufficient to support profitable operations if it continues without competition. If the market is served by two stations, it appears that the two stations could develop more revenue than is required to sustain one station, and doubtfully enough to sustain two -- but only if the second station's revenue requirements are less than one-third of KIVA's actual expenses. It appears most unlikely that any station can operate within the budgets projected by the three new stations, and if they could, such an operation would hardly provide a service of the character being provided by KIVA. The revenue potential of the market is clearly inadequate to support the operation of three or four stations, even on the basis of the apparently understated revenue requirements for the new stations.

This analysis should not be interpreted to indicate that Yuma and Imperial counties taken together are not capable in

time of supporting competitive television operations. There are prospects, as indicated earlier, for continued growth at a moderate rate. Considering the economic character of the region and the reasonable prospects for growth, it is necessary to conclude that Yuma and Imperial counties are not now, and for five to ten years hence will not be, in a position to support two competing television stations.

5. Tentative Findings Regarding Probable Effects of Competition on Television Service in Imperial and Yuma Counties.

In authorizing additional television stations it is the effect which competition will have on the availability of service to the public and on the quality of that service which must be determinative. In small markets, television stations lead a precarious existence with narrow, or non-existent, profit margins, with limited working capital, and with investments which may be rendered obsolete by technological change. In such a setting, there is no cushion of financial reserves to sustain prolonged deficit operations. The operation of two television stations in the Yuma-El Centro market will, it appears, produce deficit operations for the next five years, at least. The operations of three or four stations will certainly involve large losses for all stations for the foreseeable future.

The quality of television service which the public receives is not independent of the economic health of the television stations which provide service. With inadequate incomes, competing television stations would find it impossible to provide the quality of programming which the public interest requires. Each station would be compelled by necessity to subordinate programming to considerations of revenue and expense, and the public would suffer an inevitable degradation of service.

Unlike some public utilities, television stations cannot sustain continued operating losses. At the point where capital improvements or replacements become necessary, the television station without reserves, without adequate present income and with no prospect for future profits must suspend operations. Then the public is faced with a loss of service after suffering a deterioration in the quality of service.

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A. D. RING & ASSOCIATES
Consulting Radio Engineers
1710 H Street, N. W.
Washington 6, D.C.

September 6, 1963

City of Washington)
District of Columbia) ss

Howard T. Head, being first duly sworn, upon oath deposes and says that he is a consulting radio engineer, a partner in the firm of A. D. Ring & Associates, with offices at 1710 H Street, N.W., Washington, D. C. He is a registered professional engineer (Reg. No. 2521) in the District of Columbia. His qualifications as an engineer are a matter of record with the Federal Communications Commission.

The firm of A. D. Ring & Associates has been retained by Valley Telecasting Company, licensee of Television Broadcast Station KIVA, Yuma, Arizona, to make engineering studies of the comparative coverage of KIVA and other television stations authorized at Yuma and at El Centro, California. KIVA operates on Channel 11 with an ERP of 316 kw and an effective antenna height of 440 feet. KBLU-TV holds a construction permit to operate at Yuma on Channel 13 with an ERP of 1.97 kw and an effective antenna height of 236 feet; an application is pending for an increase in ERP to 11.2 kw. Two construction permits have been granted at El Centro, Cali-

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fornia, one to KXO-TV to operate on Channel 7 with an ERP of 82.3 kw and an effective antenna height of 410 feet; the other to KECC-TV to operate on Channel 9 with an ERP of 55 kw and an effective antenna height of 600 feet.

All three of these stations would provide Grade B coverage to portions of the area within the Grade B contour of Station KIVA. No other United States television station^{1/} provides Grade B coverage to the area within the Grade B contours of any of these stations.

A series of maps has been prepared showing the Grade A and Grade B contours of Station KIVA as compared with the Grade A and Grade B contours of each of the other authorizations listed above. The area and population (in the U.S.) within the various contours have been determined, and a determination has been made of the area and population served by one station but not by the other in each case.

Figure 1 is a map showing the computed Grade A and Grade B contours of Station KIVA compared with the Grade A and Grade B contours for KBLU-TV, Yuma, as presently authorized. The area and population are as follows:

TABLE I
AREA AND POPULATION
WITHIN COVERAGE CONTOURS

<u>Contour</u>	<u>Population</u>	<u>Area</u>
KIVA Grade A	38,984	1,930 sq. mi.
KIVA Grade B	97,460	4,300
Pres. KBLU-TV (CP) Grade A	30,773	138
Pres. KBLU-TV (CP) Grade B	36,995	754
Served by KIVA but not by KBLU-TV (CP)		
Grade A	8,211	1,792
Grade B	60,465	3,546

^{1/} Mexican Station XEM-TV, Mexicali, B.C. provides Grade B coverage to a portion of this area.

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TABLE I (CONT)

<u>Contour</u>	<u>Population</u>	<u>Area</u>
Served by KBLU-TV but not by KIVA		
Grade A	None	None
Grade B	None	None

Figure 2 is a map showing the same information as Figure 1, except that the contours shown are those for the proposed operation of KBLU-TV with higher power in BMPCT-5849. The area and population are as follows:

TABLE II
AREA AND POPULATION
WITHIN COVERAGE CONTOURS

<u>Contour</u>	<u>Population</u>	<u>Area</u>
KIVA Grade A	38,984	1,930 sq. mi.
KIVA Grade B	97,460	4,300
Prop. KBLU-TV Grade A	34,650	324
Prop. KBLU-TV Grade B	38,240	1,408
Served by KIVA but not by KBLU-TV		
Grade A	4,334	1,606
Grade B	59,220	2,892
Served by KBLU-TV but not by KIVA		
Grade A	None	None
Grade B	None	None

Figure 3 is a map showing the calculated Grade A and Grade B contours for KIVA in comparison with the Grade A and Grade B contours for KXO-TV, El Centro. The area and population are as follows:

TABLE III
AREA AND POPULATION
WITHIN COVERAGE CONTOURS

<u>Contour</u>	<u>Population</u>	<u>Area</u>
KIVA Grade A	38,984	1,930 sq. mi.
KIVA Grade B	97,460	4,300
KXO-TV (CP) Grade A	59,853	1,065
KXO-TV (CP) Grade B	102,944	3,305
Served by KIVA but not by KXO-TV (CP)		
Grade A	38,344	1,535
Grade B	5,986	2,377
Served by KXO-TV (CP) but not by KIVA		
Grade A	59,505	670
Grade B	11,470	1,382

Figure 4 is a map showing the calculated Grade A and Grade B contours for KIVA in comparison with the Grade A and Grade B contours for KECC-TV (CP), El Centro, California. The area and population are as follows:

TABLE IV
AREA AND POPULATION
WITHIN COVERAGE CONTOURS

<u>Contour</u>	<u>Population</u>	<u>Area</u>
KIVA Grade A	38,984	1,930 sq. mi.
KIVA Grade B	97,460	4,300
KECC-TV (CP) Grade A	66,492	1,518
KECC-TV (CP) Grade B	105,316	4,010
Served by KIVA but not by KECC-TV (CP)		
Grade A	38,281	1,383
Grade B	4,304	2,127
Served by KECC-TV (CP) but not by KIVA		
Grade A	65,789	971
Grade B	12,160	1,837

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The Grade A and Grade B contours shown in Figures 1 through 4 were taken from the engineering exhibits supporting the applications for the respective facilities. An exception is the present authorization of KBLU-TV, since the pertinent maps could not be located in the Commission's files. These contours were computed by this affiant. The population counts are based on the 1960 Census and were made using Minor Civil Divisions Maps. Areas were measured using a polar planimeter.

As noted, the coverage contours are calculated contours taken from the engineering exhibits supporting the respective applications. In this connection, it will be observed that the KIVA contours shown in Figures 1 through 4 are irregular in shape, whereas the contours for the other stations are relatively regular. The irregularity of the KIVA contours is due to the fact that the contours shown take into account terrain limitations in accordance with Section 3.684(f) of the Commission's Rules. No such showing was made in the exhibits supporting the applications for the other stations, but an analysis of the terrain in the Yuma and El Centro areas leads to the conclusion that terrain limitations would be expected to reduce the actual coverage of KBLU-TV, KXO-TV, and KECC-TV below that shown in Figures 1 through 4. To this extent, the maps and tables overstate the actual Grade A and Grade B coverage expected to be rendered by these stations.

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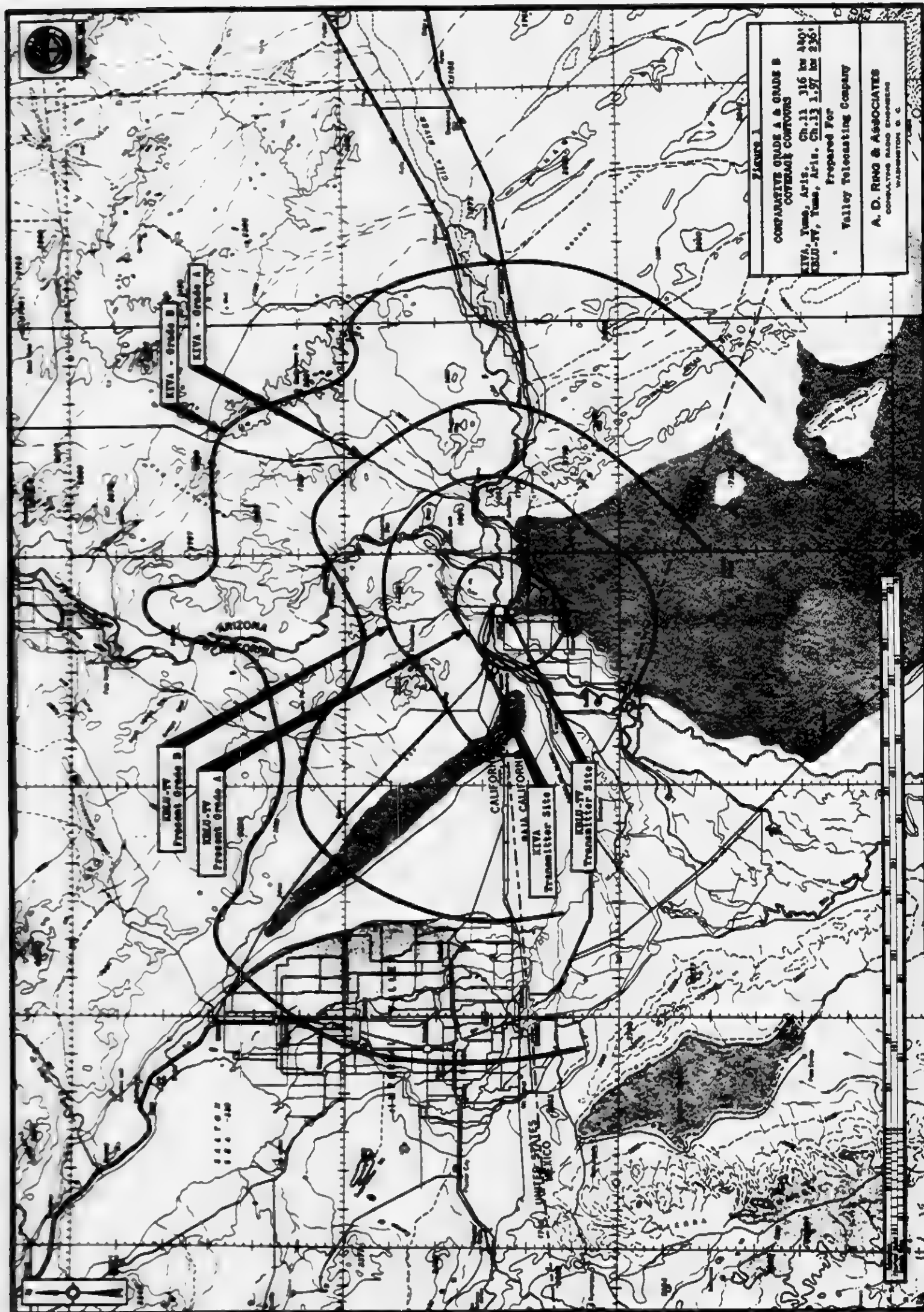
Affiant states that the calculations and exhibits in this report were made by him personally or under his direction and that all facts contained herein are true of his own knowledge except where stated to be on information or belief, and as to those facts, he believes them to be true.

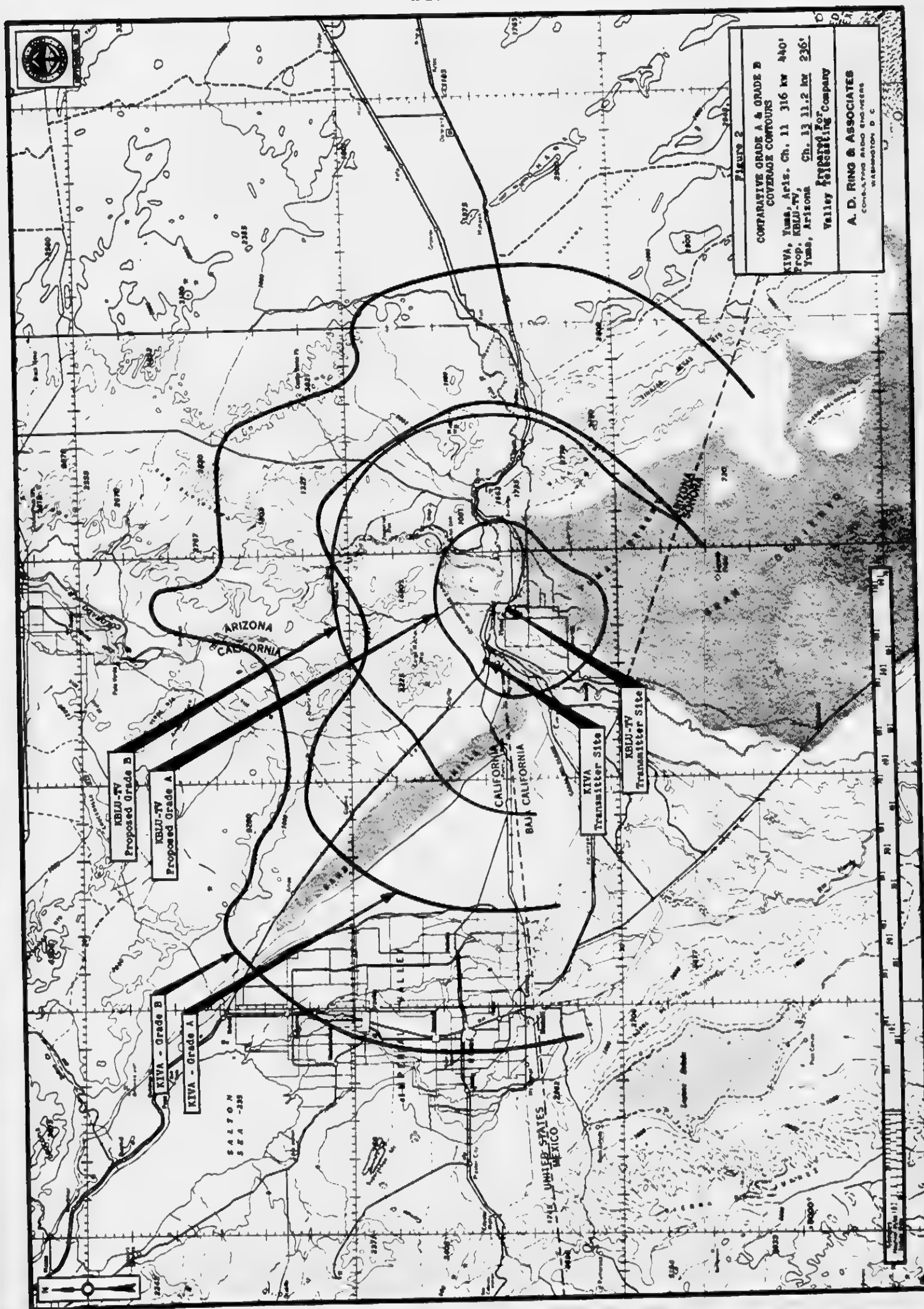
/s/ Howard T. Head, Affiant

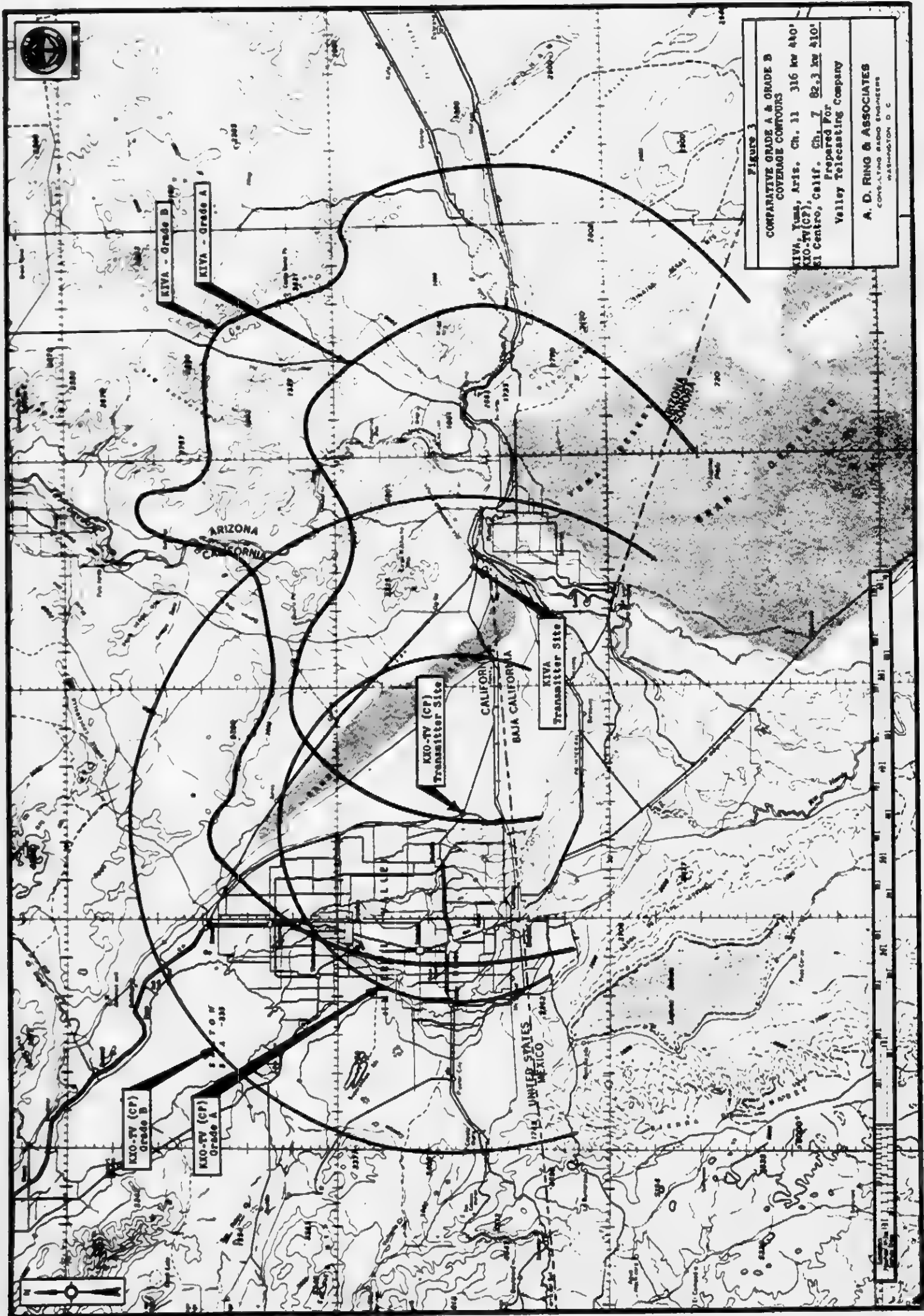
Subscribed and sworn to before me this 6th day of September, 1963.

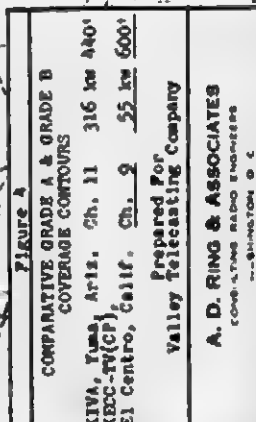
/s/ Elsie Roache, Notary Public

My commission expires: March 31, 1968









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[Received September 23, 1963 - F.C.C.]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Application of)	
Robert Hardy Langill and Robert)	
William Crites d/b as)	File No. BMPCT-5826
DESERT TELECASTING COMPANY)	
For additional time to construct Television)	
Station KBLU-TV, Channel 13, Yuma,)	
Arizona)	
Robert Hardy Langill and Robert)	
William Crites d/b as)	
DESERT TELECASTING COMPANY (ASSIGNOR))	
and)	File No. BAPCT-328
DESERT TELECASTING COMPANY, INC.)	
(ASSIGNEE))	
For Voluntary assignment of construction)	
permit of Station KBLU-TV, Yuma, Arizona)	
Robert William Crites tr/as)	
DESERT BROADCASTING COMPANY (ASSIGNOR))	
and)	File No. BAL-4738
DESERT TELECASTING COMPANY, INC.)	
(ASSIGNEE))	
For Voluntary assignment of license of)	
Station KBLU, Yuma, Arizona)	

OPPOSITION TO PETITION FOR RECONSIDERATION

Desert Telecasting Company, Inc., permittee of Television Station KBLU-TV, Yuma, Arizona (hereinafter "KBLU-TV"), opposes the petition for reconsideration of the above-captioned grants filed on September 9, 1963, by Valley Telecasting Co., Inc., licensee of Station KIVA, Yuma, Arizona (hereinafter "KIVA") for the following reasons:

1. KIVA's economic analysis purports to show that the potential television revenue in the Yuma market is almost completely exhausted by the present sales efforts of Station KIVA, and that the revenue thus realized is barely enough to support one station -- KIVA. KIVA has submitted a 147 page economic analysis prepared by Dr. Irston R. Barnes purporting to support this conclusion. This lengthy study is notable for one glaring omission. The study does not even mention, much less weigh the effects of the fact that the television market in Yuma at the present time is tapped not only by KIVA but also by the community antenna television system in Yuma, which is under common ownership with KIVA.

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2. Since there is only one television station in Yuma at the present time and since that station is the only one which even provides a reception service to Yuma, it is natural that many persons in the community who can afford to do so have chosen to pay the required monthly fee (\$7.50) in order to have a choice of television programs. The Yuma Cable System brings five television channels to its subscribers, including KIVA. Assuming that cable subscribers watch the five stations available on the cable system in approximately equal proportions, KIVA would thus be viewed approximately 20% of the time by the cable subscribers. The Commission cannot ignore the fact that, if additional free television services become available from regular television broadcast stations in the area, many cable subscribers would naturally choose to watch these free programs instead of continuing to pay a monthly fee for the privilege of watching television programs. Thus a large viewing audience for local television programs would become available, beyond that which is now available to KIVA. Thus KIVA's entire economic analysis of the potential of the Yuma market is based on a false premise.

3. It is interesting to note that Dr. Barnes in his study makes a number of statements which tend to confirm our thesis that KIVA to date has been tapping something less than the full potential of the Yuma market.

In the first place, during the entire period covered by the economic statistics which he recites, KIVA did not bother to make available a studio in Yuma for the convenience of local residents. It maintains a studio 8 miles away in the desert (Barnes Study, p. 95). There is no showing that any public transportation was available to the studio in the desert. Normally, a television station attempting to generate the maximum of local interest and local participation in its programming would maintain a studio in the city, or perhaps immediately adjacent thereto. Dr. Barnes' study contains numerous other indications that KIVA has failed to explore the market as fully as it pretends. Further, on page 60, Dr. Barnes notes that the Paducah-Cape Girardeau-Harrisburg market had a population less than that of the Yuma-El Centro market, which Dr. Barnes says is the proper market area for KIVA. In spite of this lower population,

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television broadcast revenues in the Paducah-Cape Girardeau-Harrisburg market were almost five times those of KIVA, which is the only station in its market. This remarkable circumstance is not explained by Dr. Barnes. No facts appear in his study which would explain the remarkable failure of KIVA to achieve broadcast revenues comparable to those achieved in those markets of like size. It should be noted that Yuma and El Centro are prosperous cities and in fact are both growing rapidly. Therefore, no argument of economic depression can account for the notable failure of KIVA to achieve results comparable to those achieved in like markets. As noted on page 60 of the Barnes study, the Paducah-Cape Girardeau-Harrisburg market has three television stations, and each one achieved greater broadcast revenues than those achieved by KIVA, which operates alone in a larger market'.

4. As Dr. Barnes notes on page 80, the revenues achieved by KIVA in each year have been less than half of the median figures for comparable markets of its size.

5. In this connection, it should be noted that El Centro which is postulated by Dr. Barnes as being part of the Yuma television market also has a community antenna television system owned by the same corporation which owns KIVA.

6. Although Dr. Barnes' thesis is that the potential television revenue in the Yuma market is pretty well exhausted by KIVA, he recites numerous facts which tend to indicate that the Yuma area is a growth area and that an increase in potential advertising revenues might thus be expected. Yuma County had a population increase of 62% in the 10 years from 1950 to 1960 (Barnes, p. 26). Agricultural production, which is the principal industry in Yuma County increased in value more than 50% in the five years between 1954 and 1959 (Barnes, p. 30). During the ten years between 1950 and 1960, government employment increased by 87% in Yuma County (Barnes, p. 38). Manufacturing employment also increased over 50% (Barnes, p. 41). In view of these evidences of continued economic growth, KIVA has certainly not made out a prima facie case for its thesis that the economic growth of the area is about to slow down or stop.

[R. 368 and 369]

7. In the preceding paragraphs, Dr. Barnes' thesis that El Centro is part of the Yuma television market has been accepted, for the sake of argument. However, it should be noted that his argument in this regard is highly questionable. Since two new television stations have been authorized at El Centro, he argues that the entire market will have four stations. But it is by no means clear that the Yuma television market includes El Centro. El Centro is 55 miles away from Yuma. If the two stations authorized at El Centro go on the air and the present community antenna television service there continues, there is no reason to suppose that El Centro viewers will watch the Yuma stations in large numbers. Likewise, there is no reason to suppose that Yuma viewers will watch the El Centro

stations in large numbers if the El Centro stations do go on the air so as to deprive the Yuma stations of local viewers. It should be noted that Yuma will not be provided a Grade A signal by either of the proposed El Centro stations (see figures 3 and 4 of the engineering study attached to KIVA's petition). The significance of this for our purposes is as follows: Since El Centro is a substantially smaller city than Yuma (Barnes, p. 24), splitting of the Yuma market between two stations would leave each with a larger potential market than splitting the Yuma-El Centro market between four stations. Dr. Barnes' belief that Yuma and El Centro are one television market and will continue to be so when each gets its own station is another basic assumption underlying his arguments, for which assumption he offers no evidence.

8. In view of the foregoing, it is submitted that KIVA has yet to demonstrate a reasonable likelihood that the advent of KBLU-TV on the air will cause the dire effects forecast by KIVA. Even if Dr. Barnes' study, which is far from objective in tone or method, provides sufficient support for KIVA's thesis, the problem would remain whether it can properly be considered at this time. It should be noted that KIVA has certainly abused the Commission's processes. It withdrew on January 30, 1962, its objection to another application then pending for a new television station in Yuma (New England Industries, Incorporated) and never filed a formal objection to the KBLU-TV application before grant during all the months it was

pending. Since the KBLU-TV application was granted, KIVA has filed numerous pleadings in an effort to prevent KBLU-TV from going on the air. Such methods certainly do not contribute to the orderly disposition of the Commission's business. It should be noted that the same irresponsible pattern is apparent in the instant "Petition for Reconsideration". For the first time, KIVA submits to the Commission a voluminous economic

report of nearly 150 pages plus an engineering affidavit, neither of which were submitted to the Commission with the original pleadings which KIVA now asks to have reconsidered. It is submitted that KIVA by sleeping on its rights while the KBLU-TV permit was being granted and while the construction of KBLU-TV was actually begun has forfeited any right to submit the studies here submitted. For the reasons set forth in the preceding paragraphs, the economic study of Dr. Barnes, even if it should be considered, fails to demonstrate KIVA's thesis, since there are other facts not mentioned by Dr. Barnes which completely underline his central thesis that KIVA has exhausted the potential television revenues in the Yuma market.

9. In its argument (pp. 20-21) against the grant of the KBLU-TV extension application, KIVA misstates the applicable cases, the law, and the Commission's rules. Oregon Radio, Inc., 16 RR 1023, cited by KIVA, holds that a permittee who has been granted an extension cannot come in and obtain another extension on the ground that he failed to complete construction during the time of the previous extension because his intention to construct was dependent on some contingency which did not occur. That situation is obviously distinguishable from the present situation, where KBLU-TV's intention to proceed with construction was dependent on the grant of the co-pending assignment application which was granted by the Commission at the same time. Thus KBLU-TV cannot argue, as the applicant did in Oregon Radio that the contingency upon which construction depended never occurred. As a matter of fact, the assignment which was the condition to proceeding with construction has been granted and consummated and construction is proceeding.

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10. In stating the applicable statutory law (Section 319(b) of the Communications Act) KIVA notes that one reason for extension is the occurrence of circumstances "not under the control of the grantee." However, Section 319(b) provides that the station must be ready for

operation by the original expiration date of the permit "or within such further time as the Commission may allow"; no limitation is placed upon the reasons for which the Commission may allow further time. Thus, the matter of extension is left to the Commission's discretion. This would have been apparent if KIVA had quoted the pertinent sentence in full. Likewise, Section 1.323(a) of the Commission's rules also contains a provision, conveniently overlooked by KIVA allowing the Commission to extend the completion date for construction upon a "showing of other matters sufficient to justify the extension." Thus, contrary to KIVA's argument, the Commission is allowed to grant extensions for reasons other than the occurrence of circumstances beyond the control of the grantee.

11. In attacking the assignment applications on their merits, KIVA (p. 21) does not give a fair statement of the circumstances surrounding these assignments. KIVA indicates that the original permittee of KBLU-TV (the partnership) sold the permit to an assignee who was a stranger to the original permit. That is by no means the case. The original partnership was composed of Mr. Crites and Mr. Langill (50% each). After the permit for KBLU-TV was finally granted, Mr. Langill determined that he could not safely proceed with this venture. Mr. Crites desired, nevertheless, to proceed with construction, and accordingly sought other business partners. The corporation which is now the permittee is owned (50% each) by Mr. and Mrs. Crites and Mr. and Mrs. Noga. Thus, there is a very substantial identity between the assignor and the assignee. The Commission presumably took this circumstance into account in weighing the merits of the assignment application, but KIVA conveniently omits any reference to these facts. Certainly, Mr. Crites had equitable considerations on his side in seeking to keep the permit alive by assigning it to a corporation in which he would continue to hold a 50% interest since denial thereof

would simply mean that the expenditures previously made by the partners would go down the drain.

12. KIVA argues (p. 22) that it has submitted evidence concerning an alleged statement by Mr. Crites that KBLU-TV would carry the entire CBS Network schedule. It should be noted that the so-called "evidence" offered by KIVA is only second-hand hearsay, and the content of the alleged evidence is so vague that it presents no concrete problem warranting further inquiry by the Commission. Similarly, the alleged problem concerning the program proposals of KBLU-TV is also illusory. KBLU-TV proposes an average of only 12 commercial spot announcements per hour during the entire broadcast week, which is clearly in line with the Commission's current standards for processing applications for new stations. It is not true that the problem exists simply because KIVA says it does.

WHEREFORE, for the foregoing reasons, the Petition for Reconsideration must be denied because KIVA has failed to present any adequate reason for the Commission to reconsider its previous decision.

Respectfully submitted,

DESERT TELECASTING COMPANY,
INC.

By /s/ Samuel Miller

/s/ Mark E. Fields

Its Attorneys

* * *

September 23, 1963

[Certificate of Service]

[Received October 3, 1963 - F.C.C.]

**REPLY TO OPPOSITION TO PETITION
FOR RECONSIDERATION**

Valley Telecasting Co., Inc., licensee of Television Station KIVA, Yuma, Arizona, (hereinafter "Valley" or "KIVA"), replies to the "Opposition to Petition for Reconsideration" filed by Desert Telecasting Company, Inc., (hereinafter "Desert"), in the above-captioned matters, as follows:

1. The Desert Opposition is directed primarily at the economic study attached to Valley's Petition for Reconsideration.

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The study, by Dr. Irston R. Barnes,^{1/} was undertaken to assess the capacity of the Yuma-El Centro market to support competing television services. In his analysis, Dr. Barnes deliberately recognized the established policy of the Commission to authorize competing television services wherever possible consistent with the provision of satisfactory service to the public.^{2/} Although the operation of community antenna television systems in Yuma and El Centro is not explicitly discussed in the report, the existence of these systems was not ignored. To have treated these CATV systems as competing television systems would have been to assume that Yuma and El Centro already had competing television services and that the construction of additional television stations would involve the addition of third, fourth and fifth stations. Consistent with recognizing the full potential of the market to support competing television services, the study by Dr. Barnes assumed that the entire, undiluted market was available to support additional local television stations. His analysis is, therefore, predicated on assumptions most favorable to finding an opportunity for competing television stations. To include the CATV systems as effecting a division of the market into smaller shares for the competing stations would have required judgments less favorable to

competition respecting the attractiveness, or lack of attractiveness, of such small market segments to advertisers and consequently less favorable conclusions as to advertising revenues for a local station.

1/ "Opportunities for Competition in Television Operations in the Southern Arizona-California Border Region," attached to Valley's Petition for Reconsideration, filed on September 9, 1963.

2/ Attached hereto is an affidavit by Dr. Barnes attesting that he has read the Desert Opposition and this Reply thereto and that the economic facts and conclusions in this Reply accurately reflect his original study and are true and correct.

[R. 375]

2. The argument is advanced in Desert's "Opposition to Petition for Reconsideration" that the attraction of television viewers from the community antenna television systems to the local stations would result in larger viewing audiences. By this argument it is presumably intended to imply that larger advertising revenues would thereby be available. There are no facts to support such an implication. The Barnes Study was predicated on a consideration of the full potential for the Yuma-El Centro market. No deduction was made for viewers subtracted by CATV operations. Moreover, the number of CATV subscribers, whether "subtracted" from the market or "added back", would represent too small a fraction of the market to make any material difference. As of September 1, 1963, the approximate number of CATV subscribers was only 4,000 (1500 in Yuma and 2500 in El Centro) which is 14.8 percent (12.8 percent for Yuma and 16.2 percent for El Centro) of the 27,100 TV homes credited to Station KIVA by the Television Factbook, 1962-63 Edition.

3. The abolition of the CATV systems would not change the magnitude of the market to a degree that would generate more advertising, either nationally, regionally or locally, or that would permit television stations to charge higher rates. Thus "KIVA's entire economic analysis of the potential of the Yuma market" is not, as Desert attempts to argue, "based on a false premise"; it is based on the premise most favorable to

finding an economic opportunity for competing stations to enter the market. And on this most favorable premise, the study finds no adequate economic support for competing television operations at this time.

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4. Further, the Desert Opposition contends that the Barnes Study tends to confirm Desert's thesis that KIVA has not fully tapped the market potential. Contrary to this assertion, there are no facts or findings in the Barnes Study to support an argument that KIVA has failed to exploit fully the revenue potentials of the Yuma-El Centro market. The argument which Desert attempts to erect on the basis of the showing with respect to the Paducah-Cape Girardeau-Harrisburg market (citing the Barnes Study, page 60) blandly ignores the fact that the data in Table 5 are on a Standard Metropolitan Area basis. As Dr. Barnes explained on page 54, -- "The Standard Metropolitan Area is in almost every instance smaller than the total market area served by the television stations located therein. Consequently, all of the magnitudes presented in Table 5 are understated -- except for the KIVA market area, where the surrounding deserts virtually guarantee that Yuma County and Imperial County are the effective market areas for KIVA." This warning, also ignored by Desert, was repeated on page 60.

5. That the Standard Metropolitan Area basis understates the Paducah-Cape Girardeau-Harrisburg market is apparent from the reported broadcast revenues of \$1,795,525, and is confirmed by reference to the Television Factbook, 1962-63 Edition. Therein it appears that the Paducah station (WPSD-TV) reaches 304,400 TV homes, with an ARB total net weekly circulation of 199,500; its network base hourly rate is \$525. The Cape Girardeau station (KFVS-TV) reaches 272,700 TV homes, with an ARB total net weekly circulation of 203,200; its network base

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hourly rate is \$625. The Harrisburg station (WSIL-TV) reaches 281,700 TV homes; no weekly circulation figures are given; but its network base hourly rate is \$350. Thus, the example that Desert cites demonstrates that KIVA has done relatively better than these stations in developing revenues. The following table depicts the comparison:

	<u>TV Homes</u>	<u>Weekly Circ.</u>	<u>Network Rate</u>	<u>Total Broadcast Revenues</u>
Paducah	304,400	199,500	\$525)	\$ 1,795,525
Cape Girardeau	272,700	203,200	625)	
Harrisburg	281,700	-	350)	
KIVA	27,100	22,100	150	380,179
KIVA percentages	9-10%	11%	24-43%	21%

Source: Television Factbook, 1962-63 Edition

In summary, KIVA reaches 27,100 TV homes, 9-10 percent of the three-station market, with an ARB total net weekly circulation of 22,100 or 11 percent of the three-station market; its network base hourly rate of \$150 is 24 to 43 percent of the rates for the three stations, and its broadcast revenues are 21 percent of the total for the three stations. Thus with a market only one-tenth the size of the three-station market, KIVA has achieved revenues equal to one-fifth (21%) of the broadcast revenues of the three-station market.

6. Dr. Barnes did not rest content with comparative statistics to determine if KIVA had satisfactorily exploited its revenue potential. His study examined the indications with respect to the levels of expense incurred by KIVA (Barnes Study, pp. 73-96). And most important, he undertook an analysis of KIVA's advertising experience for three years. (Barnes Study, pp. 96-102, and Appendix.) While it is a fact that KIVA "has been less

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successful than most stations in its class in developing advertising revenues", this is attributed to "the limited economic potential of its market." (Barnes Study, p.3) By picking "bits and pieces", Desert seeks to obscure Dr. Barnes' clearly stated conclusion: "A review of all of KIVA's advertising accounts for a recent year and a survey of potential advertisers as disclosed by the classified telephone directories indicate that KIVA has diligently exploited the revenue possibilities of its market but that it has encountered increasing difficulty in sustaining the earnings of the two preceding years." (Barnes Study, p. 4)

7. Desert's reference to KIVA as having neglected to develop "local interest and local participation" by reason of having its Yuma studio located eight miles from the city at the site of its transmission tower hardly deserves an answer. The fact is that KIVA's Yuma studio has, since June 1963, been located in the heart of the City of Yuma. It was originally located at its transmitter site as an economy measure. When television was new this short distance was no obstacle to getting program participants to come to the transmitter site studio. But, when television was no longer a novelty and this relatively short distance seemed even the slightest handicap, KIVA moved its studio to a downtown location at considerable expense.

8. Desert attempts to draw from Dr. Barnes' study a conclusion that the Yuma market has imminent prospects for substantial growth by resorting to the fallacy of percentages and trends, despite the warning that "any solid estimate of the economic potential ... must be based, not upon trends and per-

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centages, but upon attained levels of economic activity or upon growth so imminent that its character can be specifically identified." (Barnes Study, pp. 26-27) The 62 percent population increase from 1950 to 1960, which Desert cites, brought Yuma County population to only 46,235 in

1960. (Barnes Study, p. 26) Agricultural production has been the foundation of the economic growth of Yuma and Imperial Counties; it is, therefore, of more significance that there is no prospect of bringing large new acreages under irrigation (Barnes Study, pp. 33-35) than that the value of agricultural production in Yuma County increased by 53 percent between 1954 and 1959. (Barnes Study, pp. 29 and 31) It is more significant that government employment in 1960 was only 2,957 than that it increased by 87 percent in the preceding ten years. (Barnes Study, p. 38) It is of little significance that manufacturing employment in Yuma County increased by 53 percent (Barnes Study, p. 41), compared with the fact that that increase represented only 192 additional manufacturing employees and that total employment in manufacturing in 1960 was only 556. (Barnes Study, p. 29) This careless use of percentages is wholly at variance with Dr. Barnes' carefully weighed analysis and completely inconsistent with his documented conclusion: "An examination of the growth experience and current positions in agriculture, mining, manufacturing, wholesale and retail trade, finance, and government activities provides no basis for projecting a more than modest rate of growth for the foreseeable future" (Barnes Study, p. 2), which is coupled with the warning that "such expansion is not in early prospect and cannot be identified as to its nature or predicted with respect to time." (Barnes Study, p. 50)

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9. It is not clear what Desert's juggling of population figures for the cities of Yuma and El Centro signifies, other than confusion. El Centro was, in 1960, a smaller city than Yuma, (Barnes Study, p. 24), but television stations, both at El Centro and at Yuma, would be viewed by audiences living outside the corporate limits of the two cities. By every index of population, employment and income, Imperial County is a larger economic market than Yuma County. (Barnes Study, p. 29) Contrary to Desert's assertion, "splitting of the Yuma market between two stations" would not "leave each with a larger potential market than

splitting the Yuma-El Centro market between four stations." (Desert Opposition, par. 7)

10. Dr. Barnes treated the Yuma and Imperial Counties as a single television market, not because they are, in fact, one market, but rather because it requires a market of at least their combined size to support satisfactory television service for the public; neither market alone is capable of affording the kind of service to which the public is entitled. Regardless of whether or not the two areas are, in fact, one market, KIVA has drawn significant revenues from both communities; both communities have received service from KIVA. Both communities would certainly make use of whatever television viewing opportunities are operating in the region. Television waves do not stop at city or county limits and viewers are certainly not limited by political boundaries in their selection of programs. Therefore, regardless of the technical definition of a television market, and irrespective of the application of such a definition to the communities encompassed by KIVA's signals, the economic circumstances of the entire

KIVA coverage area (whether one market or more) must be considered in determining whether or not the establishment of a new television station therein would cause destructive economic injury inimical to the public interest.

11. Turning to the question of timeliness (Desert Opposition, par. 8), Valley stands on its previous statements concerning that question as set forth in its "Petition for Reconsideration" and other pleadings. Valley has certainly not abused the Commission's processes as alleged by Desert. The reasons for not pleading detailed evidentiary facts sooner were fully set forth in the Petition for Reconsideration and need not be here repeated. Desert has failed to advance any new arguments on that score. Moreover, even if it were true that Valley "slept on its rights", (a contention which Valley vigorously denies), Desert cannot seriously argue

that the injurious consequences of such a delay should be visited upon the public. In view of the severe damage to the public, clearly and positively demonstrated by the Barnes Study and accompanying engineering report, the Commission should, on its own motion, if necessary, set the grants aside and designate the matter for hearing. The way is still open to avoid serious harm to the public. The public interest will not permit such harm to be condoned on the ground of the timeliness of presenting the evidence of harm.

12. Desert's sophistry in arguing the applicability of Oregon Radio, Inc., 26 FCC 197, 16 RR 1023 (1959), scarcely merits a reply. Desert did not know in advance that the Commission would simultaneously rule on its separate applications for assignment of permit and for extension of construction time. Neither did

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Desert have any assurance that the assignment application, the grant of which Desert assigned as a condition precedent to construction, would, in fact, be granted. In Oregon, the condition precedent to construction, which the Commission held was not a valid reason to delay construction, was also an assignment application. Thus, it is difficult to see why the rationale of Oregon, where a new extension was requested, should not be applicable to Desert which requested its first extension. The reason advanced for the extension by Desert was that the contingency upon which construction depended, the grant of the assignment, had not occurred. The Commission has made it clear in the past that inability and unwillingness to construct before the grant of an assignment do not constitute a "showing of other matters sufficient to justify the extension." The Commission erred in failing to apply the same standard here.

13. As to Mr. Crites' statement that he would broadcast the entire CBS schedule over Desert's station, Valley offered to prove that fact and, significantly, the statement in question has not been denied by Mr. Crites. The question should be resolved in a hearing.

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WHEREFORE, it is requested that the Commission grant the relief requested in Valley's Petition for Reconsideration.

**Respectfully submitted,
Valley Telecasting Co., Inc.**

By: Paul A. Porter

Reed Miller

Thomas G. Fisher

Arnold, Fortas & Porter

Dated: October 1, 1963

Its Attorneys

[R. 383]

AFFIDAVIT

District of Columbia)

) ss:

City of Washington)

I, the undersigned Irston R. Barnes, author of "Opportunities for Competition in Television Operations in the Southern Arizona-California Border Region," which study was submitted to the Federal Communications Commission in connection with the Petition for Reconsideration of Valley Telecasting Company, Inc. in File Nos. BMPCT-5826, BAPCT-328 and BAL-4738, being duly sworn on oath hereby state that I have studied the Opposition of Desert Telecasting Company to the above Petition for Reconsideration; that I have read the foregoing Reply to the Opposition to the Petition for Reconsideration to be filed by Valley Telecasting Company, Inc., and that the economic facts and conclusions contained in the foregoing Reply accurately reflect my aforementioned study and are true and correct to the best of my knowledge.

/s/ Irston R. Barnes

[JURAT dated October 1, 1963]

[Certificate of Service]

[R. 385]
[R. 709]B 41055
FCC 63-919MEMORANDUM OPINION AND ORDER

By the Commission: Commissioners Henry, Chairman; Hyde and Cox absent.

1. The Commission has before it (a) the above-captioned applications; (b) a "Motion for Stay", filed on August 30, 1963, by Valley Telecasting Co., Inc., licensee of Station KIVA(TV), Yuma, Arizona; (c) an "Opposition to Motion for Stay", filed on September 9, 1963, by Desert Telecasting Company, Inc.; and (d) a "Reply to Opposition to Motion for Stay" filed on September 17, 1963.

2. The Motion for Stay alleged that "...it is essential that, pending a decision on the Petition for Reconsideration, the above-captioned applicants be barred from consummating the assignments and the present ownership status quo be maintained." The request for this relief,

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[R. 710]

however, was moot when it was filed, because the applicants notified the Commission on August 30, 1963, that they had consummated the assignment on August 29. In its reply to the opposition Valley concedes that the assignment has been consummated, but still urges that its motion for stay of the authorizations be granted.

3. Valley has not shown that failure to grant the requested stay would cause irreparable injury to the public, or its own interests. It alleges that the consummation removes Robert Hardy Langill from Commission jurisdiction and prevents restoration of the status quo, but the Commission will retain jurisdiction over the above-captioned applications until it acts on the Petition for Reconsideration filed on September 9, 1963, by Valley. cf. Enterprise Co. v. FCC, 231 F. 2d 708, 13 Pike & Fischerr RR 2033 (1955); Radio Americana Inc., 21 Pike & Fischer 195 (1961). Valley also alleges that any expenditures of funds furnished by new principals in the assignee would prohibit a restoration of the status quo.

As Valley concedes, however, any expenditures by these principals will be at their own risk. Valley has made no showing that these expenditures will cause irreparable injury prior to Commission action on the aforementioned petition for reconsideration. cf. Zenith Radio Corporation, 8 Pike & Fischer RR 895 (1953).

4. In view of the foregoing, IT IS ORDERED, This 9th day of October, 1963, that the "Motion for Stay" filed by Valley Telecasting Co., Inc., on August 30, 1963, IS HEREBY DENIED.

FEDERAL COMMUNICATIONS
COMMISSION

Ben F. Waple
Secretary

Released: October 11, 1963

FCC Form 316
July 1954
Section I

Form Approved
Budget Bureau No. 82-7027-10

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION

APPLICATION FOR CONSENT TO ASSIGNMENT OF RADIO
BROADCAST STATION CONSTRUCTION PERMIT OR LICENSE

GENERAL INSTRUCTIONS

A. This form is to be used in all cases when applying for Authority for Assignment of a Radio Broadcast Station Construction Permit or License. It consists of two parts which are to be completed by the Assignor and the Assignee, respectively.

B. The assignor's part consists of pages 1, 2, and 3 of Section I.

C. The assignee's part consists of pages 4 and 5 of Section I and the following other sections:

Section II, Legal Qualifications of Broadcast Applicant

Section III, Financial Qualifications of Broadcast Applicant

Section IV, Statement of Program Service of Broadcast Applicant

Information requested of the assignee in Paragraphs 1 and 3 of Section III of this application is not required of an assignee of a licensed station but must be furnished by an assignee of a permittee only.

D. Prepare and file three copies of this form and all exhibits and swear to one copy. File with Federal Communications Commission, Washington 25, D. C.

E. Number exhibits serially in the spaces provided in the body of the form. List exhibits furnished by the assignor on page three of this part; list the assignee's exhibits on page five of Part II. Date each exhibit.

F. Information called for by this application which is already on file with the Commission need not be refiled in this application provided (1) the information is now on file in another application or FCC form filed by or on behalf of these applicants; (2) the information is identified fully by reference to the file number (if any), the FCC form number, and the filing date of the application or other form containing the information and the page or paragraph referred to, and (3) after making the reference, the applicants state: "No change since date of filing." Any such reference will be considered to incorporate into this application all information, confidential or otherwise, contained in the application or other form referred to. The incorporated application or other form will thereafter, in its entirety, be open to the public.

G. BE SURE ALL NECESSARY INFORMATION IS FURNISHED AND ALL PARAGRAPHS ARE FULLY ANSWERED. IF ANY PORTIONS OF THE APPLICATION ARE NOT APPLICABLE, SPECIFICALLY SO STATE. DEFECTIVE OR INCOMPLETE APPLICATIONS MAY BE RETURNED WITHOUT CONSIDERATION.

desires to withdraw from said partnership and obtain additional financing from both operations through the introduction of Mr. and Mrs. Noga as principals.

A. The name of the assignor must be stated exactly as it appears in the authorization to be assigned.

B. This part of this application must be executed by assignor if an individual; by one of the partners of the assignor if a partnership; by an officer of assignor if a corporation or association; or by attorney in which event satisfactory evidence of disability of assignor or his absence from the Continental United States and authority of attorney to act must be submitted with application.

File No.

KAL-4738

Name and post office address of assignor (See Instruction A for Part I)

Robert William Crites t/a393
Desert Broadcasting Company
1320 4th Avenue
Yuma, Arizona

Send notices and communications to the following named person at the post office address indicated:

Samuel Miller, 1032 Wash. Bldg., Wash. D.C.

Name of assignee

Desert Telecasting Company, Inc.

Address of assignee (number, street, city, state)

1320 4th Avenue, Yuma, Arizona

1. Authorization which is proposed to be assigned

Call letters

Location

KBLU

Yuma, Arizona

File number

Date of grant

BR-3822

1-31-63

If license, give expiration date

10-1-65

If construction permit, give date of required completion

Authorizations of any Remote Pickup, STL, or other stations which are to be assigned

Call letters

File numbers

KF-6914

BMPRE-615

2. Is assignor or any person controlling assignor party to any litigation or proceeding which may in any manner affect (or be affected by) the proposed assignment? If so, describe fully

Yes ☐ No ☒

FEB 20 1963

F. C. C.

3. Give a full statement of assignor's reasons or purposes for requesting this assignment.

It is my desire to consolidate into one entity KBLU which I individually own and KBLU-TV, in which I am a partner with Robert Hardy Langill. Mr. Langill has recently purchased a gift shop and desires to withdraw from said partnership. Under this proposal, I would obtain additional financing from both operations through the introduction of Mr. and Mrs. Noga as principals.

4. Do you propose to request a tax certificate pursuant to Section 112 (a) of the Internal Revenue Code if this proposed assignment is granted? If so, submit as Exhibit No. a brief statement giving the basis for this request.

Yes ☐ No ☒

5. If this application is approved, will assignor upon the settlement date either file with the Commission or furnish to assignee (show which), for the period from the first of the calendar year to the settlement date, the broadcast operating and statistical data relating to the station or stations involved which are called for in Schedules 1 and 2 of the Annual Financial Report (FCC Form No. 326)? Will furnish to Assignee

Yes ☒ No ☐

DOC Form 314

PART I (Continued)

Section I, Page 2

6. Is the information shown in Yes ☒ No ☐
 assignor's Annual Ownership Report now on file with
 the Commission true and correct as of this date?

If the answer is "No", attach as Exhibit No. _____ an
 Ownership Report supplying full information to bring
 such data up-to-date.

7. Does the assignor, or any partner, officer, director,
 member of the assignor's governing board, or any stockholder
 owning 10% or more of the assignor's stock, have any inter-
 est in or connection with the following (if so state what
 interest or connection):

a. Any standard FM, or television broadcast station?

KBLU-TV - Partner

b. Any application pending before the Commission?

c. Dismissed and/or denied applications?

8. Attach as Exhibit No. 1 a schedule showing the
 original cost, the original date of purchase, the
 original cost less depreciation, and the estimated re-
 placement cost for each item listed in Schedule 3 of
 the Annual Financial Report. (Original Cost means
 the actual cost to the first person dedicating the
 property to broadcast service. Original Purchase
 Date means the date on which the property was first
 dedicated to broadcast service.) If the information
 is not available, show why and furnish estimates. If
 the assignment arises out of death or legal disabili-
 ty of assignor, or is made without valuable con-
 sideration for the properties and equipment assigned,
 the assignor need not supply the information called
 for in this paragraph. However, the Commission re-
 serves the right to call for information as to the
 station's technical and non-technical equipment and
 property.

9. Attach as Exhibit No. 2 a balance sheet showing as-
 signor's present financial condition.

10. Describe fully and give present values of any properties
 equipment, or other assets, exempted from, or liabilities
 not involved in, the proposed assignment together with re-
 sulting effect on net worth shown in balance sheet of
 assignor.

See Ex. 3

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11. a. Attach as Exhibit No. 4 copies of the contract or
 agreement to transfer the property and facilities of the
 station including also but not limited to trusts, leases,
 debentures, and any other instruments which effect or com-
 plete the assignment (See Sec. 1.342 of the Commission's
 Rules). If there is only an oral agreement, reduce the
 terms to writing and attach.

b. Is this instrument joined in Yes ☐ No ☒
 by assignor?

If the answer is "No", explain why the instrument is not
 jointly executed by assignor and assignee. **Formal**
agreement not yet executed

c. Show here the consideration (monetary, services, or
 otherwise) to be paid for the properties, etc., to be
 transferred and describe terms of payment.

See Ex. 4

The assignor represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination
 on any other application with which it may be in conflict.

All the statements made in this part of this application and attached exhibits called for by this part are considered material
 representations, and all the exhibits are a material part hereof and are incorporated herein as if set out in full in this ap-
 plication.

The assignor, or the undersigned on the assignor's behalf, states that he has endeavored to supply full and correct information
 as to all matters which are relevant to this application and that he has done so as to all matters within his own knowledge.

Dated this 15th day of February, 1963

Robert William Crites t/a
 DESERT BROADCASTING COMPANY

By Robert William Crites (Name of assignor)

Licensee

Title

Subscribed and sworn to before

on this _____ day of _____, 19____.

Notary Public

(Notary public's seal must be affixed where the law of
 jurisdiction requires, otherwise state that law does not require seal.)

My commission expires _____

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LAW OFFICES
FARBER, COHEN & DIAMOND
608 FIFTH AVENUE
NEW YORK 20, N. Y.

MORTON H. FARBER
FRANK R. COHEN
NATHAN DIAMOND

February 14, 1963

Mr. Thadi Baker
217 2nd Avenue
Yuma, Arizona

Re: Desert Telecasting Company, Inc.
Stockholders Agreement

Dear Mr. Baker:

As per our telephone conversation, the following is my understanding of the basic agreement between the parties.

(1) The corporation is to issue 25,000 shares of stock at \$1.00 per share and a five year promissory note in the sum of \$45,000 at 5% interest to Robert and Patricia Crites, in consideration of their transferring of Radio Station KBLU and the TV construction permit to the corporation and 25,000 shares of stock to Helen and John Noga in consideration of their investing \$25,000 in the corporation. Each party - Robert Crites, Patricia Crites, Helen Noga and John Noga is to own 12,500 shares.

(2) Helen Noga and John Noga will lend to the corporation \$45,000, \$10,000 of which will be loaned at the time of issuance of stock and \$35,000 as and when needed after May 1, 1963 and will receive promissory notes due in 5 years at 5% interest for their loans.

3. The corporation shall employ Crites as per employment agreement annexed for a 5 year period and he shall devote his full time to business and manage same.

4. The parties will agree to vote for each other as follows:

Robert Crites
Patricia Crites
Helen Noga
John Noga

President and Director
Secretary and Director
Vice-President and Director
Treasurer and Director

5. All decisions requiring either directors approval or stockholders approval must be unanimous.

6. Each stock certificate shall have noted thereon that its transfer is subject to this agreement.

Ex 4

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CIRCLE 7-8418
CABLE: FARCOOH

RECEIVED
FEB 20 1963
F. C. C.
OFFICE OF THE SECRETARY

Mr. Thadd Baher - Page 2

7. If either Helen or John Noga desire to transfer any or all of their shares of stock to anyone other than to each other or members of their family, they have to obtain a written offer and then give Robert Crites a 10 day period in which to match the offer before accepting same.

8. If either Robert or Patricia desire to transfer any or all of their shares of stock to anyone other than to each other or members of their family they have to obtain a written offer to sell all of the outstanding stock of the corporation (the shares belonging to Helen and John Noga as well as their own). If Helen and John refuse to go along with the offer after ten days notice, then they can obtain a written offer for their stock alone and then give Helen and John Noga a ten day period in writing in which to match the offer before accepting same.

Very truly yours,


Frank R. Cohen

FCC Form 314

PART II (To be completed by ASSIGNEE)

Section I, Page 4

INSTRUCTIONS FOR PART II (Assignee)

A. The name of the assignee, stated in Section I hereof, shall be the exact corporate name, if a corporation; if a partnership, the names of all partners and the name under which the partnership does business; if an unincorporated association, the name of an executive officer, his office, and the name of the association. In other sections of the form, the name need be only sufficient for identification of the assignee.

B. This part of this application must be executed by assignee if an individual; by one of the partners of the assignee if a partnership; by an officer of assignee if a corporation or association; or by attorney of assignee only under conditions shown in Section 1.303, Rules Relating to Practice and Procedure, in which event satisfactory evidence of disability of assignee or his absence from the Continental United States and authority of attorney to act must be submitted with application.

C. Before filling out this application, the assignee should familiarize himself with the Communications Act of 1934 and the following parts of the Commission's Rules and Regulations: Part I, Rules Relating to Practice and Procedure; Parts Relating to the Broadcast Services.

1. Give a full statement of assignee's reasons or purposes for requesting this assignment.

Provide additional ownership capital for construction of KBLU-TV and operation of KBLU-AM and TV. Desire of Robert Hardy Langill to withdraw from KBLU-TV. Desire of Mr. and Mrs. Noga to acquire interest in radio property in Yuma market, of which Mr. Noga has made study.

2. What is the name and address of the owner of the station (if other than the assignee)?

a. Identify by date and names of parties any contracts entered into by assignor (including those for network service, use of mechanical records, sale of bulk time, etc., filed pursuant to Section 1.342) which will be performed by assignee.

KBLU-AM studio lease; A.P., transcription services

b. If any changes will be made in contracts assumed by assignee, describe fully

None

3. Attach as Exhibit No. 1 a projected balance sheet showing assignee's financial condition after giving effect to the provisions involved in this application as of the same date of the balance sheet submitted in response to Section III, Para. 2, of this application.

Name and post office address of assignee (See Instruction A for Part II)

Desert Telecasting Company, Inc.
1320 4th Avenue
Yuma, Arizona

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Send notices and communications to the following-named person at the post office address indicated: Samuel Miller, Wash. Bldg., Wash., D.C., and Farber, Diamond, 608 5th Ave., N.Y. 20, N.Y.

4. a. Will assignee's control over the station, its property and equipment arise out of voluntary agreement with the assignor? If the answer is "Yes", attach three copies of the agreement as Exhibit No. , unless heretofore attached in answer to Par. 11a, Part I of Section I hereof.

Yes ☐ No ☐

Any contract, lease or other voluntary agreement under which assignee claims control over the station must specifically show (1) assignee will have complete control over all necessary physical property and its use and unlimited supervision over the programs to be broadcast; (2) consideration, whether monetary or otherwise, and whether paid or promised; (3) all other terms and conditions involved in the assignment, including a statement that the instrument submitted covers the entire arrangement between the parties (if it does not, all other pertinent legal instruments must be submitted); (4) assignment is subject to consent of the Commission.

5. Does assignee's control over the station, its property and equipment arise out of involuntary action? If the answer is "Yes", give as Exhibit No. a full narrative statement of the character and status of proceeding (i.e., administration of estate, bankruptcy, dissolution, etc., or operation of law in any other manner), showing all parties thereto, and attach copies of will, letters testamentary, letters of administration, or pleadings and court orders properly certified by the clerk of the court having jurisdiction over the matter.

Yes ☐ No ☒

The assignee waives any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests consent to the assignment of this license and/or construction permit in accordance with this application. (See Section 304 of the Communications Act of 1934)

The assignee represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict.

All the statements made in this part of this application and attached exhibits called for by this part are considered material representations, and all the exhibits are a material part hereof and are incorporated herein as if set out in full in this application.

RECEIVED
FEB 20 1933
F. C. C.
OFFICE OF THE SECRETARY

EXHIBIT V

As shown by the exhibit submitted in response to Section I, Paragraph 11, Robert W. Crites will contribute the assets and liabilities presently devoted by him to the operation of Station KBLU, for which he and Mrs. Crites will receive an aggregate of 50% of the stock when all is issued. Mr. and Mrs. Noga are obligated to purchase stock as well as provide funds by way of loans. Their financial ability to fulfill these commitments is evidenced by the attached documents.

RECEIVED
FEB 20 1953
F. C. C.
OFFICE OF THE SECRETARY

[R. 718]

[Received December 5, 1961 - F.C.C.]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Application of)	
THE NEW ENGLAND INDUSTRIES,)	File No. BPECT-2969
INCORPORATED)	
)	
For Construction Permit for)	
New Television Station,)	
Yuma, Arizona)	
)	

PETITION TO DENY

Valley Telecasting Company, licensee of Television Station KIVA, Yuma, Arizona (hereinafter called "Valley"), pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended, respectfully petitions that the above-captioned application for a permit to construct a new television station in Yuma, Arizona, be denied. The principal ground assigned for this petition is that, as will be detailed below, because of the destructive economic competition which would follow a grant of the above application, Yuma, Arizona, would be totally deprived of television service and, therefore, a grant of the above-entitled application would not be in the public interest, convenience and necessity. Furthermore, Valley wishes to point out other defects in the above application which indicate that serious questions exist as to whether or not a grant of the application would serve the public interest.

[R. 719]

A. Valley's Interest

1. Valley Telecasting is the licensee of Television Station KIVA, Channel 11, Yuma, Arizona. It operates with full power and maintains studios at its transmitter site near Yuma as well as an auxiliary studio in El Centro, California. Valley is affiliated with and is carrying programs of ABC, CBS and NBC. Station KIVA serves Yuma County in

Arizona, Imperial County in California, as well as portions of San Diego and Riverside Counties in California. Except for a Mexican television station, which programs predominantly in the Spanish language, and which serves part of the above market, and possible fringe service from San Diego and Los Angeles, which can be received only by exceptionally high and expensive home antennas, KIVA is the only television station serving Yuma, most of Yuma County, El Centro, other nearby cities, and most of Imperial County.

2. Despite of its apparently favorable position, Valley has been unable substantially to expand or increase its local advertising revenues. Its financial history reflects a struggle for survival. KIVA's first ownership, which put the station on the air in 1953, was forced to undergo an arrangement for creditors under Chapter XI of the Bankruptcy Act in 1957, and the station ownership was transferred to new owners. Since that time the station has made intensive efforts to improve its operation. Improved transmitter, antenna, microwave and projection equipment have been installed and the El Centro auxiliary studio has been established. These improvements have enabled KIVA to televise improved and more varied programming at maximum power to an enlarged audience.

[R. 720]

3. As a consequence of these efforts, KIVA, for the first time during its existence, closed the year of 1960 with a profit -- of \$5,303.00. This first gain, however, affected the operating deficit, in excess of \$400,000, but in a small way. An analysis of the profit and loss statements during the current fiscal year, copies of which are attached hereto, (which also show the 1960 figures for the same months), indicates that the small profit of last year does not prove a general upswing.

4. For instance, for the seven-month period of March 1 to October 31, 1961, the local advertising income, which is income from the Yuma area itself, was \$40,033.07. The revenue from the same source for the identical period in 1960 was almost \$4,000 more.

5. New England proposes to broadcast but a few hours per day -- during prime evening viewing hours. It need not be emphasized that a large portion of a station's revenue is earned by broadcasts during these hours.

6. It is submitted that KIVA, because of its unique position as the only station in Yuma, because of its affiliation with all the television networks, because of its intensive improvement of service and the use of two studios and because of its tenacious struggle, not only to provide the best available service to its viewers, but also to make the rendering of this service a long-run financial success, has exhausted to the utmost the limited potential of commercial television operations in the Yuma market. Based on its long years of experience in

[R. 721]

operating a commercial television station in that market, it is the considered opinion of Valley that the Yuma market, which can scarcely support the one existing local television station, would be unable to support an additional television service.

7. Any success in a new television venture in Yuma would be carved out from KIVA's present sources of revenue and would cause direct, substantial and fatal competitive injury to Valley. Valley, therefore, is clearly a "party in interest" within the meaning of Section 309(d) (1) of the Communications Act.

**B. Economic Injury to Valley Adversely Affects
The Public Interest.**

8. New England, as an applicant, has the burden of showing not only legal, technical and financial qualifications for becoming a permittee and licensee of the Commission, but also that the "public interest, convenience and necessity" would be served by a grant of its application. Since the competition proposed by the application will inevitably result in the diminution and total destruction of KIVA's broadcast service, New England has failed to meet this burden.

9. Even assuming that the new station would survive after it had ruined KIVA, several basic allocation objectives espoused by the Commission would be frustrated. Of most importance, a major white area would be created by the deletion

[R. 722]

of KIVA which would not be covered by the low-power part-time television service proposed by the above applicant. The economic destruction of KIVA would, therefore, deprive a substantial number of people of their only television service.

10. Moreover, because of the precarious nature of the Yuma television market, as demonstrated above, there is no realistic hope that even the new station would survive. It is obvious that if KIVA, with its superior facilities and much wider coverage, can barely subsist as the only station in the Yuma area -- although a great portion of its revenue is derived from sources other than local Yuma advertisers (upon whose support New England relies -- the new station, which limits its market to only the City of Yuma, would also have to go dark because of the financial losses it would necessarily incur. Thus, the economic impact of the operation of the proposed station would first deprive most of the viewers within KIVA's coverage of all television service, and, subsequently would deprive all viewers within the Yuma market of all television service. Besides being detrimental to Valley's private interests, therefore, a grant of the above-captioned application would also be detrimental to the public interest. Carroll Broadcasting Company v. Federal Communications Commission, 258 F.2d 440, 17 RR 2066 (D.C. Cir. 1958).

[R. 723]

11. In the Commission's effort to determine the public interest question involved, Valley wishes to make available to the Commission all market information data it has collected over the years. While New England, of course, proposes to establish a much more limited service

than that of Valley's, certain valid conclusions can be drawn from the data collected by Valley as to the actual market situation. For example, projecting the data contained in the attached exhibits, which show the KIVA's local advertising revenue averages between \$5,000 to \$6,000 per month during 1961, we may safely reach the conclusion that the income from that source will be approximately \$70,000. From the same source, New England expects to receive \$166,000 during its first year of operation. It would appear that New England's estimates, for which it offers no factual basis, are not only overly optimistic but also highly exaggerated.

"While the Act surely precludes the Commission from regulating competition per se, and from guaranteeing a particular broadcaster a profitable operation, it does not require the Commission to guarantee such broadcaster a non-profitable operation to the detriment of the public interest." WHAS, Inc., 21 RR 929, 939 (1961).

C. Other Considerations

12. Continuing from the above reasoning, therefore, it is very questionable whether New England's proposal to provide a second Yuma television outlet for a total cost of \$83,500 is based on realistic facts and realizable calculations. New England's estimated cost of operation for the first year is

[R. 724]

\$153,824. This figure is roughly half of KIVA's annual operating expenses. Considering the limited facilities which the meager initial outlay for construction would permit, and the operating costs allocated by New England, the production of any appreciable quantity of local programs of quality appears impossible. On the basis of the part-time operation proposed by New England, the indicated percentage for local programs would entail only 5 hours of live programming per week. The accomplishment of even this meager amount of local programming and the other objectives of New England on a monthly budget of \$12,000 seems problematic even when the most stringent economies--which would bring program quality much below the standard of acceptability--were introduced.

13. Should it be found that New England can, in fact, produce local programming to fill in the promised time segments, it is obvious that on basis of the budget proposed, the quality of such programming could not reach average standards, nor could it be a meaningful reflection of public need. In fact, both the quantity and the quality of such local programs raise the question whether the public need would be adequately served by such broadcasts.

14. Valley is further informed, believes and therefor alleges that the site for the proposed operation of New England's television station is occupied by a large office building. It may be desirable for the Commission to request additional information concerning the availability or suitability of the studio and transmitter site proposed in the above application.

[R. 725]

WHEREFORE, the premises considered, Valley Telecasting respectfully requests that the application of New England Industries, Incorporated, for a permit to construct a television station to be operated on Channel 13 in Yuma, Arizona, be designated for hearing on such issues as the Commission deems proper in light of the foregoing and in light of the decision of the Court of Appeals in Carroll v. Federal Communications Commission, supra; and that Valley Telecasting Company be made a party to the hearing.

Respectfully submitted,
VALLEY TELECASTING COMPANY
By: /s / Reed Miller
/s/ Thomas G. Fisher
Arnold, Fortas & Porter
* * *
Its Attorneys

Dated: December 5, 1961

[Certificate of Service]

[Received January 8, 1962 - F.C.C.]

**REPLY OF THE NEW ENGLAND INDUSTRIES, INCORPORATED
TO PETITION TO DENY**

The New England Industries, Inc., applicant for a new commercial television broadcast station to be operated on Channel 13, Yuma, Arizona, by its attorneys, hereby files its Reply to the Petition to Deny.

In support hereof the following is shown:

I.

Section 309(d)(1) of the Communications Act
of 1934, as Amended, Requires that Petitioner
be a Party in Interest

1. As pointed out in the Petition to Deny, Section 309(d)(1) of the Communications Act of 1934, as amended, requires that the Petitioner in the case of a Petition to Deny must be a "party in interest." Based upon the allegations made in the Petition, the New England Industries, Inc., concedes "interest," for present purposes.

II.

Section 309(d)(1) of the Communications Act
of 1934, as Amended, Requires that the Petition
Establish a Prima Facie Case

2. Section 309(d)(1) of the Communications Act of 1934, as amended, requires that, in addition to a showing of "interest," a Petition

to Deny must contain allegations of fact sufficient to show that "... grant of the application would be prima facie inconsistent with ..." the public interest, convenience and necessity. This the instant Petition does not do. In lieu of "allegations of fact," the Petition to Deny consists of a series of conclusionary statements without basis in fact. It is respectfully submitted that the Decision of the United States Court of Appeals for the District of Columbia Circuit in the Carroll Case^{1/} does not require the Commission to deprive the people of Yuma of an obviously needed

service based upon such a thin showing. It is clear that much more is required than that which is contained in the instant Petition.

3. It is important for the people of Yuma, Arizona, to have a second choice of local programming, and the Commission should not countenance such obvious dilatory tactics as Valley Telecasting Company states in its pleading:

"Valley is affiliated with and is carrying programs of ABC, CBS and NBC. Station KIVA serves Yuma County in Arizona, Imperial County in California, as well as portions of San Diego and Riverside Counties in California. . . . KIVA is the only television station serving Yuma, most of Yuma County, El Centro, other nearby cities, and most of Imperial County."

Although Valley may be in an enviable position, competitionwise, the Commission should not lend its hand to continuance of this situation, indefinitely.

I/ Carroll Broadcasting Company v. Federal Communications Commission, 258 F.2d 440, 17 RR 2066 (D.C. Cir. 1958).

[R. 736]

III

The Question of the Need for Two Television Services in Yuma Has Been Passed Upon by the Commission and Should Not Be Upset Except Upon a Most Substantial Showing

4. The Commission decided the question as to whether Yuma should have two television stations when, in the Sixth Report on Television Allocations, it allocated Channels 11 and 13 to that city.^{2/} The Commission need not be reminded of the voluminous data and the several proceedings which formed a part of the ultimate final television allocation plan. Clearly, the instant case is, therefore, distinguishable from the Carroll Case, supra, which involved a standard broadcast station and where no allocation table existed. It does not appear from the record that when the Commission made its determination of the public interest question involved, Petitioner, Valley Telecasting Company, made available to the Commission its "considered opinion" that it so readily offers now.

IV

The Doctrine of the "Auburn" Case

5. We respectfully submit that Valley Telecasting Company has not sustained its burden of showing that Yuma cannot support two television stations. If the Commission believes, however, that the matter should be the subject of inquiry, then, in that event, the doctrine of the Auburn Case^{3/} should be invoked. The Station KIVA Renewal Application should be

^{2/} Pike and Fischer RR 91:45 at paragraphs 935-936.

^{3/} In re Application of Herbert P. Michaels, File No. BP-10994, Memorandum Opinion and Order, released August 5, 1958, FCC 58-B 771, Mimeo No. 61687.

[R. 737]

called up so that the Commission can determine, on the record, which applicant would better serve the public interest.

V

Conclusion

It is respectfully submitted that the Petition to Deny should be denied. The Petition does not meet the statutory requirements of Section 309(d)(1) of the Communications Act of 1934, as amended, particularly in light of the fact that a television allocation question which has previously been decided by the Commission is involved. If the Commission grants the relief prayed for, then, in that event, it is requested that the doctrine of the Auburn Case be made applicable and that the Station KIVA Renewal Application be called up and set for hearing.

Respectfully submitted,
THE NEW ENGLAND INDUSTRIES,
INCORPORATED

By /s/ Thomas H. Wall
/s/ John B. Jacob
/s/ Alfred C. Cordon, Jr.
Its Attorneys

January 8, 1962

[Certificate of Service]

[Received January 30, 1962 - F.C.C.]

WITHDRAWAL OF PETITION TO DENY

Valley Telecasting Company, licensee of Television Station KIVA, Yuma, Arizona (hereinafter called "Valley"), respectfully withdraws its Petition to Deny filed in the above-captioned matter on December 5, 1961. The grounds therefor are as follows:

1. Valley is aware of the Commission's announced priorities in the assignment of television channels^{1/} of which the second one is to provide each community with at least one television station and the fourth one is to provide each community with at least two television stations. Valley's petition was prompted by the desire not to have Priority No. 2 frustrated in the above-captioned applicant's attempt to achieve Priority No. 4 in Yuma, Arizona.

2. The economic grounds on which Valley's petition was based were supported by data reflecting the current market situation in Yuma, Arizona. The conclusions of Valley were intended to cover the present circumstances.

^{1/} Sixth Report on Television Allocations, 1 Pike and Fischer RR (Part 3) 91:599, at 91:620.

3. In the meanwhile, Desert Telecasting Company also filed an application (BPCT-2979) for a construction permit for a new television station to operate on the same facilities for which New England Industries, Incorporated (hereinafter called "New England") applied. Pursuant to the Ashbacker doctrine^{2/} a comparative hearing must be held to determine which of the two applicants for Channel 13 in Yuma, Arizona, should receive the grant.

4. The time involved in conducting and resolving a comparative television hearing is often substantial. Under the circumstances now

obtaining it is not expected that a final decision would be rendered and that construction by the winning applicant would be commenced within the near or reasonably foreseeable future.

5. Valley does not know when such final grant may issue and finds it difficult to foretell whether or not the economic circumstances then obtaining would be the same as described in Valley's petition. However, Valley reiterates that, as of now, Yuma is unable to support another television station.

6. Inasmuch as the contemplated comparative hearing between New England Industries and Desert Telecasting may be a protracted one spanning as much as two years or more and since it is difficult at this stage to forecast the economic

^{2/} Ashbacker Radio Corp. v. Federal Communications Commission, 326 U. S. 327 (1945).

[R. 741]

impact on the existing station two years hence, Valley has concluded that no useful purpose would be served, at this time, by prosecuting further its Petition to Deny. Accordingly, the Petition to Deny is respectfully withdrawn.

Respectfully submitted,
VALLEY TELECASTING COMPANY
By: /s/ Reed Miller
/s/ Thomas G. Fisher
Arnold, Fortas & Porter
* * *
Its Attorneys

Dated: January 30, 1962
[Certificate of Service]

Broadcast Application		FEDERAL COMMUNICATIONS COMMISSION		Section III	
FINANCIAL QUALIFICATIONS OF BROADCAST APPLICANT		Name of Applicant Desert Telecasting Company			
<p>The Commission is seeking in the questions that follow information as to contracts and arrangements now in existence, as well as any arrangements or negotiations, written or oral, which relate to the present or future financing of the station; the questions must be answered in the light of this instruction.</p> <p style="text-align: right;">NOV 30 1951 F. C. C.</p>					
<p>1. a. Give estimated initial costs of making installation for which application is made. If a contract has been entered into for the completed work, the facts as to such contract must be stated in lieu of estimates as to the several items. In any event, the cost shown must be the costs in place and ready for service, including the amounts for labor, supervision, materials, supplies and freight. Cost items such as professional fees, mobile equipment, non-technical studio furnishings, etc. should be included under "Other Items" below.</p>					
Transmitter proper including tubes		Antenna system, including antenna-ground system, coupling equipment, transmission line		Frequency and modulation monitors	
\$ 18,500.00		\$ 17,646.70		\$ 2,700.00	
				Studio technical equipment, microphones, transcription equipment, etc.	
				\$ 26,038.61	
Acquiring land	Acquiring, remodeling, or constructing buildings	Other items itemize	Total	Give estimated cost of operation for first year	Give estimated revenues for first year
Leased land	Leased space	#See below			
\$ 52/month	\$ 52/month	\$ 7,661.61	\$ 72,546.92	\$ 85,000.00	\$ 90,000.00
<p>b. State the basis of the estimates in (a) above.</p> <p>Equipment supplier's proposal for equipment proposal figures.</p> <p>#Other items: Test & other equipment from Gates Radio proposal, \$4,861.61; Installation, \$1,000.00; Remodeling, \$800.00; Freight, \$1,000.00</p> <p>note: Microwave leasing cost included in estimated operating cost.</p>					
<p>c. The proposed construction is to be financed and paid for in the following manner (including specified statements as to the approximate amount to be met and paid for from each source.) The financial plan should provide for any additional construction costs should the actual cost exceed the original estimated cost, and also for the early operation of the station in the event operating expenses should exceed operating revenues:</p>					
Existing Capital	New Capital	Loans from banks or others	Profits from existing operations	Donations	Credit, deferred payments, etc.
\$ 4,000.00	\$ ---	\$ 80,000.00	\$ ---	\$ ---	\$ 46,500.00
<p>2. a. Attach as Exhibit No. 2 a detailed balance sheet of applicant as at the close of a month within 90 days of the date of the application showing applicant's financial position. If the status and composition of any assets and liabilities on the balance sheet are not clearly defined by their respective titles, attach as Exhibit No. 2-A(a), 2-A(b) and 2-A(c) schedules which give a complete analysis of each item.</p>					

[R. 743]

[Rec'd-F.C.C.-Sep. 13, 1963]

MOTION FOR STAY

Valley Telecasting Co., Inc., licensee of Television Station KIVA, Yuma, Arizona, (hereinafter "Valley" or "KIVA"), respectfully moves that the Commission stay the effectiveness of its Memorandum Opinion and Order (FCC 63-783) released on August 9, 1963, insofar as it granted additional time to construct KBLU-TV (File No. BMPCT-5826), pending disposition of the Petition for Reconsideration filed by Valley on September 9, 1963, which requested a review of the above-captioned application and other applications covered by the above order. It is further requested that the Commission order the permittee of Station KBLU-TV to cease and desist from any further construction and/or operation of said station. In support of its motion, Valley submits the following:

1. As the Commission is aware, the permittee of KBLU-TV filed the above-captioned application with the explanation that construction would commence only if its application for the

[R. 744]

assignment of permit were approved. It is Valley's position, as detailed in its Petition for Reconsideration referred to above, and in various pleadings directed against the above-captioned and the assignment of permit applications, that the establishment of KBLU-TV or of any other new television station within the coverage area of KIVA-TV would afford economic competition which would result in the degradation or destruction of television service within the Yuma Valley and Imperial Valley areas contrary to the public interest.

2. As Valley has also previously urged, only the grant of the assignment applications could place the permittee of KBLU-TV in the financial position to construct. Therefore, Valley's previous Motion for

Stay, filed on August 30, 1963, and which is now pending before the Commission, requested that the consummation of the assignment of the KBLU-TV permit be stayed pending the Commission's action on Valley's Petition for Reconsideration, then in preparation. The Motion for Stay was filed prior to the filing of the Petition for Reconsideration (which required extensive work, being based upon a 146 page economic study, an engineering report and a multitude of prior pleadings) in order that the threatened damage to the public as well as to Petitioner could be effectively prevented by stopping the consummation of the assignment.

[R. 745]

3. However, as was pointed out in KBLU-TV's "Opposition to Motion for Stay", filed September 9, 1963, (par. 1), the notice of consummation of the assignment was filed, by coincidence, simultaneously with the filing of Valley's Motion to Stay such consummation. The "Opposition" also presents evidence that construction of KBLU-TV has already commenced. Therefore, if irreparable harm is to be avoided, the Commission must either require KBLU-TV to restore the status quo with respect to the assignment consummation or it must stay the effectiveness of its grant of extension of time to KBLU-TV to construct that station, requiring KBLU-TV to cease and desist from any further construction and operation pending the decision on Valley's Petition for Reconsideration.

4. That irreparable harm to the public and to Valley will result from the construction and operation of KBLU-TV is established by the detailed economic and engineering evidence attached to Valley's Petition for Reconsideration, filed September 9, 1963.^{1/} The 146 page "Economic Analysis" by Dr. Irston R.

^{1/} Attached to Valley's Petition for Reconsideration, filed September 9, 1963, is a 146-page economic analysis of the KIVA service area, entitled "Opportunities for Competition in Television Operations in the Southern Arizona-California Border Region," prepared by Dr. Irston R. Barnes, expert economic consultant and former economic consultant

to the Department of Justice, former Director of the Economic Bureau of and Economic Adviser to the Civil Aeronautics Board, and former Chief of the Division of Economic Evidence and Reports of the Federal Trade Commission. (continued)

[R. 746]

Barnes, which is attached to Valley's Petition for Reconsideration, demonstrates by a host of economic facts and analyses that the establishment of a second station within the KIVA service area will cause substantial diversions from KIVA's revenue, on the order of \$167,145, and would probably be of such magnitude during even the first year of operation as to wipe out KIVA's profits. Dr. Barnes concludes that "Inevitably, KIVA would become a deficit operation in the first year in which there was either two-station or three-station competition" in the area. "Diversions of the magnitude predicted," says Dr. Barnes, "would almost inevitably foreshadow the disappearance of KIVA from telecasting." ("Opportunities for Competition in Television Operations in the Southern Arizona-California Border Region", by Irston R. Barnes, September 5, 1963, pp. 118-120)

^{1/} (footnote continued)

Dr. Barnes' report contains detailed economic findings, charts, tables and analyses relating to the economy of the Yuma-El Centro area, the availability of television revenues therefrom, the economic position of KIVA in the market as compared with stations in other small markets, the KIVA revenue and expense experience as compared with other stations similarly situated, and the prospective impact of competition on television services in Yuma and Imperial counties. In addition to the economic evidence, the Petition for Reconsideration also includes an engineering statement by Howard Head of A.D. Ring and Associates, Consulting Engineers, detailing the losses and gains of service which will result if KIVA's service is replaced by that of KBLU-TV or of the two recent El Centro permittees. Both the Barnes Analysis and the engineering statement are under oath.

In view of the voluminous nature of this evidence, it would be impractical and burdensome to the Commission's files to refile the same evidence as a part of this Motion for Stay. Therefore, it is respectfully requested that the Commission either consider the Barnes Analysis and the engineering statement as incorporated herein by reference or that the Commission take official notice of those documents as now contained in its files.

5. The Barnes Analysis further concludes that the area cannot support two stations for a period of five to ten years hence and that the operations of two stations in the area will "produce deficit operations for the next five years, at least," compelling each station "by necessity to subordinate programming to considerations of revenue and expense," with the result that "the public would suffer an inevitable degradation of service." (*Ibid.*, pp. 4, 123-124)

6. There is also attached to Valley's Petition for Reconsideration an engineering statement by Howard Head of A. D. Ring and Associates, Consulting Engineers, which demonstrates that if KBLU-TV is permitted to construct and operate, thereby diverting revenues from KIVA with the result that KIVA is forced off the air, a serious loss of service to the public would result. Because of the much smaller area to be served by KBLU-TV, than is now served by KIVA, if KBLU-TV (operating as presently authorized) replaces KIVA, there will be a loss of Grade A service to 8,211 of 38,984 persons now served by KIVA and a loss of Grade B service to 60,465 of the 97,460 persons now receiving Grade B service from KIVA.^{1/} This represents a loss of service to over 21% of the

^{1/} KBLU-TV has pending an application to increase power and make other changes. If granted, the losses would be reduced somewhat. Under the proposed operation, a loss of Grade A service to 4,334 persons (over 11% of those now served by KIVA) and a loss of Grade B service to 59,220 persons (almost two-thirds of those now served by KIVA) would result. (See Engineering Statement attached to Valley's Petition for Reconsideration, filed September 9, 1963, p. 3 and Fig. 2).

Grade A population and a loss of service to about two-thirds of the Grade B population now served by KIVA. Moreover, these persons presently receive no service from United States stations other than KIVA. The losses would therefore result in creating "white areas" of the magnitude of loss above-indicated. (See Engineering Statement

attached to Valley's Petition for Reconsideration, filed September 9, 1963, p.1 and Fig. 1). That losses in service of this magnitude would be contrary and seriously detrimental to the public interest in the Yuma area would seem to go without saying.

7. Valley therefore submits that its Petition for Reconsideration contains more than ample allegations of economic and engineering facts to demonstrate without question that the construction and operation of KBLU-TV will result in irreparable damage both to Valley and to the public in the Yuma area. The fact of this irreparable damage to the public, in and of itself, demonstrates the likelihood that Valley will prevail on the merits of its Petition for Reconsideration. Confronted with the voluminous economic report, as represented by the expert Barnes Analysis, which demonstrates the clear likelihood that competition from KBLU-TV would drive KIVA off the air, and in the face of the unthinkable degradation in service to the public which will result if KBLU-TV should be permitted to replace the service of KIVA, Valley submits that the public interest demands that

[R. 749]

the Commission, on its own motion if necessary, vacate its grants to KBLU-TV and order a hearing to determine whether or not the public interest will be served by authorizing KBLU-TV to proceed. In the face of these facts, the mandate of the United States Court of Appeals in Carroll Broadcasting Company v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F.2d 440, 17 RR 2066 (1958), clearly requires the Commission to grant Valley's Petition for Reconsideration and to accord it the hearing which it has requested. Valley therefore submits that if the Commission is to act in consonance with the Court's ruling in the Carroll case, it must rule in favor of Valley on the merits. At least, the detailed evidence of threatened harm to the public interest which Valley has submitted compels the conclusion that there is a "likelihood" that Valley will prevail on the merits.

8. Unless the Commission either stays its grant of consent to the consummation of the assignment of permit for KBLU-TV, (as previously requested in Valley's pending Motion for Stay), or stays the effectiveness of its grant of extension of time to construct, requiring KBLU-TV to cease construction pending reconsideration of its grants to KBLU-TV, the construction will be completed, KBLU-TV will go on the air and the irreparable damage to the public and to Valley will forthwith become a reality.

[R. 750]

Wherefore, the premises considered, it is respectfully requested that the Commission stay the effectiveness of its grant of additional time to construct KBLU-TV (File No. BMPCT-5826) and require that KBLU-TV cease construction and refrain from operation pending the Commission's reconsideration of the grants to KBLU-TV as requested in Valley's Petition for Reconsideration filed September 9, 1963.

Respectfully submitted,

Valley Telecasting Co., Inc.

By: /s/ Paul A. Porter

/s/ Reed Miller

/s/ Thomas G. Fisher

Arnold, Fortas & Porter

* * *

Its Attorneys

Dated: September 13, 1963

[Certificate of Service]

[R. 751]

[R. 752]

[Rec'd-F.C.C.-Sep. 20, 1963]

E R R A T A

OPPORTUNITIES FOR COMPETITION IN
TELEVISION OPERATIONS IN THE
SOUTHERN ARIZONA-CALIFORNIA REGION

By Irston R. Barnes

The errata noted herein require no changes in the analysis or conclusions of the study.

P 2, ¶ 4, 1. 3	Change <u>provide</u> to <u>provides</u> .
P 6, ¶ 2, 1. 1	Change <u>sale</u> to <u>sales</u> .
P 8, ¶ 1, 1. 7	Change <u>cost</u> to <u>costs</u> , and <u>operation</u> to <u>operations</u> .
P 11, ¶ 1, 1. 6	Change <u>result</u> to <u>results</u> .
P 26, ¶ 2, 1. 6-7	<u>Read</u> : "show Arizona leading the nation in growth in population, income, non-agricultural employ- ment . . ."
P 26, ¶ 2, 1. 10	Change <u>Tuscon</u> to <u>Tucson</u> .
P 29, Col. 9, 1. 2	Change <u>+29.2</u> to <u>+29.9</u> .
P 33, ¶ 1, 1. 2	Change <u>suggests</u> to <u>suggest</u> .
P 35, ¶ 2, 1. 4-5	<u>Read</u> : "market for suppliers or manufacturers of agricultural equipment and supplies, the latter's television . . ."
P 39, ¶ 2, 1. 2	Delete <u>s</u> before "significantly".
1. 3	Change <u>Yuman</u> to <u>Yuma</u> .
P 40, ¶ 1, 1. 4	Change <u>are</u> to <u>is</u> .
P 46, ¶ 3, 1. 3	<u>Read</u> : "may be anticipated that <u>retail</u> services may continue to . . ."
P 52, ¶ 1, 1. 2	Change <u>indicate</u> to <u>indicates</u> .
P 53, ¶ 2, 1. 11	Change <u>i</u> to <u>1</u> .

[R. 753]

P 55, Col. 6 (new page)	Two corrections; 6 revisions in rounding.
Col. 9	Revision in column heading; revisions in rounding.
Col.10	Revisions in rounding.
P 56, Col. 6 (new page)	Three revisions.
Col. 8	Two errors corrected.
Col. 9	Revision in column heading.
Cols.9, 10	Revisions in rounding.
P 57, Col. 6 (new page)	Four revisions.
Col. 8	Correction of one error.
Col. 9	Revision in column heading.
Cols.9, 10	Revisions in rounding.
P 59, ¶ 2, l. 4	Change <u>5</u> to <u>3</u> .
Footnote 1	Read: "These three are Las Vegas-Henderson, . . ."
P 62, ¶ 2, l. 4	Read: <u>Sales Management</u> .
P 66, Col. 6 (new page)	Correction of errors in division; revisions in rounding.
P 67, Col. 6 (new page)	Correction of errors in division; revisions in rounding.
P 72, Col. 6 (new page)	Correction of 3 errors in division.
P 75, ¶ 3, l. 1	Change <u>in</u> to <u>an</u> .
P 77, Col. 3, l. 14	Change <u>83,900</u> to <u>83,800</u> .
P 79, ¶ 1, l. 3	Change <u>question</u> to <u>questions</u> .

[R. 754]

P 80, ¶ 2, l. 5	Read: "less than three-quarters of the median of \$425,100 for all stations."
P 80, ¶ 3, l. 2-3	Read: "In each year except 1959, KIVA's . . ."
P 81, ¶ 4, l. 2	Change <u>25</u> to <u>55</u> .
P 82, ¶ 1, l. 2	Change <u>40</u> to <u>83</u> .
l. 4	Change <u>27.4</u> to <u>22.3</u> .

[R. 761]
TABLE 7

ECONOMIC INDICATORS FOR TV MARKETS
 WITH POPULATIONS COMPARABLE^a TO
 YUMA COUNTY OR IMPERIAL COUNTY,
 1961

	(1)	(2)	(3)	(4)	(5)	(6)
<u>TV Market</u> <u>County</u>	<u>TV</u> <u>Stations</u>	<u>Popu-</u> <u>lation</u> (000)	<u>House-</u> <u>holds</u> (000)	<u>Retail</u> <u>Sales</u> (\$000)	<u>Net</u> <u>Effective</u> <u>Buying</u> <u>Income</u> (\$000)	<u>Per</u> <u>Capita</u> <u>Retail</u> <u>Sales</u> (4) ÷ (2)
Yuma, Ariz.	KIVA	47.7	13.0	73,300	78,602	1,537
Imperial, Cal.		73.8	19.0	122,904	131,810	1,665
Yuma and Imperial		121.5	32.0	196,204	210,412	1,615
Glendive, Mont.						
Dawson	KXGN	13.1	3.7	15,167	22,332	1,158
Carlsbad, N.Mex.						
Eddy	KAVE	52.6	14.6	68,163	86,954	1,296
Laredo, Tex.						
Webb	KGNS	66.6	15.3	57,904	63,636	869
Presque Isle, Maine						
Aroostock	WAGM	108.2	26.4	102,169	120,638	944
Riverton, Wyo.						
Fremont	KWRB	27.3	7.4	35,847	48,606	1,313

^a See Explanation, Table 5.

Source: Markets selected, by number of households, from TV Factbook No. 33, 1962-63 Edition; data taken from Sales Management Survey of Buying Power, June 10, 1962.

[R. 765]

[Rec'd-F.C.C.-Sep. 30, 1963]

**REPLY TO OPPOSITION TO
MOTION FOR STAY**

Valley Telecasting Co., Inc., licensee of KIVA, Yuma, Arizona, by its attorneys, replies to the Opposition of Desert Telecasting Company, Inc., to Valley's Motion for Stay of the above-captioned grant as follows:

1. With respect to the likelihood of KIVA's success on the merits, Desert's Opposition to the Motion for Stay simply recites that its Opposition to KIVA's Petition for Reconsideration demonstrates that KIVA is not likely to prevail on the merits. Valley will not here attempt to reargue the merits of its Petition for Reconsideration but rather asks that the Commission take official notice of that Petition and of the economic and engineering reports attached thereto. Certainly these documents, (Desert's Opposition thereto notwithstanding), present the reasonable likelihood that Valley will prevail in the sense that such a showing must be made for purposes of obtaining a stay.

[R. 766]

2. Desert's Opposition contends that Valley has failed to demonstrate the likelihood of irreparable harm because it has not been shown that construction of KBLU-TV will be completed prior to action on the merits and, further, even if some harm is caused to KIVA, in Desert's view it won't hurt much. Valley submits that the Barnes Economic Analysis attached to its Petition for Reconsideration demonstrates that KBLU-TV's operation would force KIVA into a deficit operation during the first year of KBLU-TV's operation. It further predicts that, inevitably, KIVA would be forced off the air. Before going off the air, Dr. Barnes notes that KIVA would be forced to curtail programming which would otherwise be in the public interest.

3. Surely, it is not necessary to show that KIVA will go off the air the moment KBLU-TV goes on in order to demonstrate irreparable harm. KBLU-TV apparently would have KIVA go all the way into the red before it would recognize that any damage had been caused. Moreover, the harm has already begun even before the construction is completed. Already, KIVA has lost its CBS network affiliation. Valley submits that irreparable harm and total destruction are not synonymous. Valley's motion for stay amply demonstrates that irreparable harm will be caused if KBLU-TV is permitted to complete construction and go on the air.

[R. 767]

4. KBLU-TV's Opposition, while expressing doubts as to whether the harm will be caused prior to a decision on the merits, at no point represents that it will not complete construction and commence operations before a decision on the merits. Indeed, there is every indication that KBLU-TV is proceeding with construction as fast as possible. Thus, in an affidavit by Mr. Crites, KBLU-TV's owner, dated September 7, 1963, which was attached to its Opposition to Motion for Stay of the grants of File Nos. BAPCT-328 and BAL-4738, it was represented that "KBLU-TV is well on its way to completion." Photographs were attached to prove the point. Under these circumstances, KIVA can take little comfort from KBLU-TV's speculation that its station may not be completed before a decision on the merits. Particularly is this so in view of the news item on page 6 of today's Television Digest for September 30, 1963, (New Series Vol. 3, No. 39), which quotes Mr. Crites as reporting that KBLU-TV has set December 1, 1963, as its on-the-air target date; that its studio-transmitter building construction commenced in August and that its transmitter will be delivered in late September. In view of this representation, it is clear that, unless stayed as requested by KIVA, construction most certainly will be completed prior to action in this case on the merits.

[R. 768]

5. KIVA reiterates that it would be grossly unjust to permit KBLU-TV to complete construction and commence broadcasting in view of the clear-cut harm which would be caused thereby both to KIVA and more importantly to the public. It is therefore earnestly urged that further construction of KBLU-TV be forthwith stayed.

Respectfully submitted,
Valley Telecasting Co., Inc.

By: /s/ Reed Miller
/s/ Thomas G. Fisher
Arnold, Fortas & Porter
* * *
Its Attorneys

Dated: September 30, 1963
[Certificate of Service]

[R. 769]

FEDERAL COMMUNICATIONS COMMISSION

DECEMBER 2, 1963

DAY LETTER

DESERT TELECASTING COMPANY, INC.
TELEVISION STATION KBLU-TV
1320 4TH AVENUE
YUMA, ARIZONA

RE TENDERED LICENSE APPLICATION AUTHORITY GRANTED
OPERATE KBLU-TV ON PROGRAM TEST ACCORDANCE SEC-
TION 3.629 RULES AND CONSTRUCTION PERMIT BMPCT-5916.
ADVISE WHEN OPERATION COMMENCES UNDER THIS AUTHOR-
ITY.

BEN F. WAPLE, SECRETARY
FEDERAL COMMUNICATIONS
COMMISSION

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,267

VALLEY TELECASTING CO., INC.

Appellant,

v

FEDERAL COMMUNICATIONS COMMISSION

Appellee,

DESERT TELECASTING COMPANY, INC.

Intervenor

On Appeal from Decisions of the
Federal Communications Commission

PAUL A. PORTER
PETER M. LER
THOMAS G. FISHER

Arnold, Fortas & Porter
1229 - 19th Street, N.W.
Washington, D.C. 20036

*Attorneys for Appellant,
Valley Telecasting Co., Inc.*



(i)

QUESTIONS PRESENTED¹

(1) Did the Commission err in holding that appellant's pleadings directed against the application for assignment of the permit to construct a new TV station in Yuma, Arizona (KBLU-TV), were either untimely or insufficient to establish the necessity of a hearing on the question of economic injury inimical to the public interest?

(2) Did the Commission arbitrarily, capriciously and contrary to law, prior precedents and policies, establish new standards for pleading a prima facie case sufficient to require a hearing on the issue of economic injury inimical to the public interest?

(3) Irrespective of the sufficiency of appellant's pleadings, did the Commission err in failing to institute its own inquiry or in failing to reconsider its decision, on its own motion, in light of the evidence before it and available to it concerning the likelihood of economic injury inimical to the public interest which would result from the consent to the application for the assignment to intervenor of the permit to construct a new station in Yuma, Arizona?

¹ Agreed to by all parties as per a pre-hearing stipulation of January 21, 1964, approved by a pre-hearing order of this Court on January 23, 1964.



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TABLE OF AUTHORITIES

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* Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327, 66 S.Ct. 148, 90 L. Ed. 108 (1945) . . .	7, 12, 24, 36, 39
Associated Industries v. Ickes, 134 F. 2d 694 (2d Cir. 1943) vacated 320 U.S. 707	37
* Camden Radio, Inc. v. Federal Communications Commission, 94 U.S. App. D.C. 312, 220 F. 2d 191 (D.C. Cir. 1954) reh. den. March 17, 1955	6, 15, 16, 19, 20
* Carroll Broadcasting Company v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F. 2d 440 (D.C. Cir. 1958) 4, 7, 8, 10, 12, 15, 16, 21, 22, 24, 25, 26, 27, 28, 29, 30, 34, 36	
* Clarksburg Pub. Co. v. Federal Communications Commission, 96 U. S. App. D.C. 211, 225 F. 2d 511 (D.C. Cir. 1955)	37, 39
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18, 267

VALLEY TELECASTING CO., INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

DESERT TELECASTING COMPANY, INC.,

Intervenor.

On Appeal from Decisions of the
Federal Communications Commission

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is taken (1) from an Order of the Federal Communications Commission, released August 9, 1963, which (a) denied appellant's petition to deny applications of Desert Broadcasting Company and of

Desert Telecasting Company to assign a permit to construct a new television station and a license for an existing standard (AM) broadcast station, both in Yuma, Arizona, to Desert Telecasting Company, Inc.; (b) denied appellant's petition to deny an application of Desert Telecasting Company for extension of time for construction of a new television station in Yuma, Arizona, and (c) denied appellant's motion to consolidate the above applications with proceedings concerning the grant of permits to construct two television stations in El Centro, California; (2) from an Order of the Federal Communications Commission, released December 9, 1963, which reaffirmed the above Order of August 9, 1963, and denied appellant's petition for reconsideration of the August 9, 1963, decision and its motion for stay of construction, and (3) from the December 2, 1963, grant by the Federal Communications Commission to Desert Telecasting Company, Inc. of authority to operate a new television station in Yuma, Arizona.

The appeal is taken pursuant to Section 402(b)(6) of the Communications Act of 1934, as amended, 47 U.S.C. §402(b)(6). Appellant is a person aggrieved or whose interests are adversely affected by the above orders of the Commission.

STATUTES AND REGULATIONS INVOLVED

The provisions of the Communications Act and of the Commission's rules involved are set out in the appendix of this brief.

STATEMENT OF POINTS

1. The Commission's denial and dismissal of appellant's pleadings directed against the application for the assignment of a permit to construct a new television station in Yuma, Arizona, and against related applications which were part of the same transaction, and against the grant of these applications, without hearing, on grounds that appellant's pleadings were untimely and/or insufficient to show that the grants thereof were prima facie contrary to the public interest, were in error because:

- (a) the Commission's holding that appellant has standing but that it failed to file a timely petition to deny is inconsistent in fact and erroneous in law since the injury to the appellant, on which its standing depends, and the injury to the public, on which the merits of the protest depend, were co-extensive and were the result of identical facts, to wit: injury to, deterioration and destruction of appellant's station as a result of assignee's establishment of a new station in Yuma;
- (b) the Commission erred in failing to designate the applications for hearing and to dispose of the public interest issues, such as destructive economic injury, mutual economic exclusivity, equitable distribution of broadcast authorizations and the new permittee's financial qualifications to operate as proposed, raised by appellant's petitions in connection with the protested applications; and
- (c) the Commission is foreclosed from raising questions of timeliness with respect to appellant's petition for reconsideration for the reason that the Commission's unlawful adoption of new pleading standards forced appellant to submit additional supporting evidentiary facts therein.

2. Regardless of the timeliness or sufficiency of appellant's petitions, the Commission erred in consenting to the assignment of the permit to construct a new station in Yuma, Arizona, because the public interest required that the Commission consider appellant's petitions and any other material available to the Commission concerning the effect of the establishment of a new television station in Yuma, either at appellant's instance or on the Commission's own motion.

STATEMENT OF THE CASE

Appellant, Valley Telecasting Co., Inc. (Valley), is the licensee of television station KIVA, operating on Channel 11 at Yuma, Arizona. Prior to the events upon which this appeal is based, KIVA was the only TV station in Yuma. On October 31, 1961, The New England Industries, Inc. filed an application for a new TV station at Yuma, to operate on Channel 13. A second competing application for Channel 13 was filed on November 30, 1961, by Robert Hardy Langill and Robert Crites, d/b as Desert Telecasting Company. Pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §309(d)(1), Valley submitted a petition to deny The New England Industries' application on December 5, 1961, contending that establishment of a second TV station in Yuma would cause economic injury to KIVA-TV so severe as to result in the latter's demise (R. 718-733). KIVA's service area is considerably larger than that proposed by the new applicant. Therefore, Valley concluded that establishment of a new station would result in a net loss of service to the public if Valley should be forced to discontinue its service. Valley submitted detailed monthly profit and loss statements in support of its petition (R. 727-733). Valley requested that The New England application be designated for hearing on an economic inquiry issue pursuant to Carroll Broadcasting Company v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F. 2d 440 (D.C. Cir. 1958).

On January 30, 1962, Valley filed a petition to withdraw its petition to deny (R. 739-741). As grounds for withdrawal, Valley stated that the forthcoming comparative hearing between the two mutually exclusive Channel 13 applicants would be of such extensive duration — perhaps two or three years — that the economic circumstances obtaining at the end of the hearing would be difficult to predict. Valley reiterated, however, that, as of then, Yuma was unable to support another TV station (R. 740). The Commission did not act on either petition.

On June 5, 1962, the Commission announced that The New England Industries had withdrawn its application for Channel 13. The application of Desert Telecasting Company was granted on July 23, 1962. The new Yuma station was assigned the call letters KBLU-TV (R. 713).

On February 20, 1963, an application was tendered ¹ seeking approval for the assignment of the license of KBLU-TV from the partnership of Messrs. Crites and Langill to a new corporation, Desert Telecasting Company, Inc., intervenor herein (R. 75-93). One half of the stock of the new corporation was owned by Mr. Crites and his wife and one half owned by Mr. and Mrs. Louis Noga of California. ² Concurrently an application was filed for approval of the assignment of AM station KBLU, owned by Mr. Crites individually, to the same new corporation (R. 392-448). As affirmed in affidavits filed with subsequent pleadings in this case, the assignment of the KBLU-TV permit became necessary because Mr. Langill, an original 50% partner, realized that he "was not emotionally prepared" for the added burden of management responsibility in the new station (R. 132). Langill also alleged that he, at no time, lacked the financial backing to take full part in the operation of the proposed station (R. 132). According to the application, Langill was to be reimbursed for \$860 out-of-pocket expenditures in prosecuting the application for a construction permit (R. 80).

Simultaneously with the filing of the assignment applications, the partnership of Messrs. Langill and Crites also applied for additional time to construct KBLU-TV (R. 1-3). That application stated that construction of KBLU-TV would proceed "[u]pon the grant of this application and the assignment application" (R. 3).

¹ Its acceptance for filing was announced on March 8, 1963.

² The assets of the new corporation were to be the KBLU-TV permit, the substantial monetary contributions of the Nogas, and the assets of Station KBLU-AM (R. 401).

On April 8, 1963, Valley filed a petition under Section 309(d)(1) of the Act to deny the two assignment applications (R. 109-122), and a second petition seeking denial of a co-pending application for extension of time to construct station KBLU-TV (R. 4-7). The contention in each of the petitions was that Yuma could not support two television stations and that establishment of an additional station would force KIVA-TV off the air causing a net loss of service to the public. Valley contended that the assignment of the fallow permit to an ostensibly solvent assignee, particularly when consent to the assignment was a condition precedent to construction of the new station, raised the destructive economic threat of early establishment of an additional station. When Valley's standing was attacked, on grounds that it had "slept on its rights" and that it should have raised the economic objections at the time the original permit was obtained, Valley replied with further elaboration on the question of standing (R. 142-146), relying on this Court's decision in Camden Radio, Inc. v. FCC, 94 U.S. App. D.C. 312, 220 F. 2d 191, reh. den. March 17, 1955 (R. 145).¹

In support of the request for a hearing on the economic issue, Valley incorporated by reference its pleadings directed against The New England application for KBLU-TV's channel (R. 110), and alleged

¹ Inter alia, Valley demonstrated, from admissions contained in the applications attacked and the pleadings and affidavits filed in opposition to Valley's petitions to deny, that the original permittee of KBLU-TV was either financially unable or emotionally unprepared to construct that station; that construction was expressly conditioned upon the approval of the assignment by the Commission; that a lease agreement for a studio building, signed shortly after the grant of the KBLU-TV permit in July of 1962, was unsigned awaiting the signature of the assignee (which fact shows that assignment rather than construction was contemplated by the original permittee and that the original permittee did not even want to be bound by a lease for studios) and that no actual construction had commenced while the permit was in the hands of the original permittee (R. 144-146).

that KIVA-TV had been a perennial loss operation from the time it began operation in 1953 until 1960, and that the original licensee had, in fact, been forced into bankruptcy in 1957. Valley stated that its net profits were only \$5,300 in 1960, \$3,642 in 1961, and \$15,140 in 1962, and that the 1962 profits masked a \$40,000 decrease in broadcast revenues from the previous year (R. 114). Valley asserted that if KBLU-TV were successful in obtaining any significant portion of the \$90,000 revenues which Desert Telecasting Company estimated it would require during its first year of operation,¹ sufficient revenues would be diverted from KIVA-TV to cause the ultimate destruction of that station. Finally, Valley argued that KBLU-TV would also face ultimate failure because its smaller service area would not provide a sufficient revenue base to support a viable operation.

In a Motion to Consolidate filed on May 9, 1963 (R. 30-42), 90 days before the Commission rendered a decision on the above petitions to deny the KBLU assignment and extension applications, Valley referred to the fact that the Commission had also granted permits to construct two new stations within KIVA-TV's service area in El Centro, California; that the new El Centro stations would rely on substantially the same market as KIVA-TV, and partially on the entire market area to be served by KBLU-TV, the new Yuma station; and contended that, since the Yuma - El Centro area can support no new television facility without a degradation or destruction of service to the public contrary to Carroll Broadcasting Co. v. FCC, 103 U.S. App. D.C. 346, 258 F. 2d 440 (D.C. Cir. 1958), the Yuma and El Centro stations were also mutually exclusive with each other, on economic grounds, requiring a hearing under the doctrine of Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1946). Valley further contended that should the Commission, after an Ashbacker and/or Carroll hearing decide that one of the new applications

¹ Its expenses for the first operating year were estimated to be \$85,000 (R. 742).

could properly be granted, Section 307(b) of the Act, which requires a fair, efficient and equitable distribution of radio facilities, further commanded a decision as to whether such new station should be assigned to El Centro or to Yuma. Moreover, since each new applicant's showing of financial qualification to effectuate its proposal depended on the same scarce revenue base (without regard for competition from each other), Valley asked for issues probing the reasonableness of the revenue estimates and the likelihood that these new stations would operate as proposed (R. 30-42, 53-61).

By a Memorandum Opinion and Order (R. 62-68) adopted August 9, 1963, the Commission ¹ denied the Valley petitions and granted the pending assignment and extension applications. This order admitted that "the grant of the assignment application will increase the likelihood of early construction of Station KBLU-TV, and that, therefore, petitioner is a party in interest with regard to the assignment applications" (R. 64). However, it regarded the petitions as an untimely attack upon the original grant of the KBLU-TV construction permit. The Commission refused to accept Valley's explanation that Valley regarded the original permit in the hands of an unwilling or unable permittee an economic threat only when it was proposed to be assigned to a solvent and willing permittee. The Commission said that Valley's concern could be justified if it had presented specific allegations of fact based on material not available at the time of the grant of the original permit to show that a Carroll hearing was required. However, the Commission held that, even considering the allegations based on information available at the time of the original grant of the permit, Valley fell short of making a prima facie showing that, because of economic injury issues, the grant of the assignment applications would be inconsistent with the public interest, on grounds that Valley's allegations were conclusionary and speculative.

¹ Six of the seven Commissioners were absent; Chairman Henry acted for the entire Commission.

The assignment of the KBLU-TV permit to Intervenor was consummated on August 29, 1963 (R. 169).¹ In a petition for reconsideration (R. 176-364) filed on September 9, 1963, under Section 405 of the Act, 47 U.S.C. §405, Valley contended that the allegations in the petitions to deny had been sufficient to justify a hearing. However, further to demonstrate its point, Valley attached a detailed 147-page expert economic analysis of the Yuma and El Centro television market area, prepared by Dr. Irston R. Barnes, the noted economist,² concluding that "the authorization at the present time of an additional television station in the Yuma - El Centro market foreshadows such revenue inadequacies as to impair the quality and jeopardize the availability of television services to the public" (R. 211). The Barnes analysis further concluded that Yuma - El Centro could not support another television station for from five to ten years hence and that the establishment of a second station would inevitably cause a degradation in service and drive KIVA off the air (R. 330). An expert engineering exhibit showing the overlapping service contours of KIVA-TV and of the new Yuma and El Centro stations, as well as population figures within those areas, was also submitted in further support of that petition (R. 355-364). This

¹ Even before the filing of a petition for reconsideration, Valley petitioned that the Commission stay its grant and thereby prevent premature construction before Valley's petition for reconsideration, then under preparation, could be considered (R. 170-175). This stay was denied on October 11, 1963 (R. 385-386), on grounds that any expenditure of funds furnished by the new principals, which could affect the possibility of restoring the status quo, was made at their own risk and that the consummation of the assignment would not deprive the Commission of jurisdiction to restore the status quo at the time it acted on Valley's petition for reconsideration (R. 386). A subsequent motion for stay of construction was regarded moot on December 9, 1963, in view of the Commission's denial of Valley's petition for reconsideration (R. 712).

² Dr. Barnes, a private economic consultant, is former professor of economics and other business courses at Yale and Columbia Universities, former Consulting Economist in the Antitrust Division of the Department of Justice, former Director of the Economic Bureau of the Civil Aeronautics Board and Economic Adviser to the Board, and former Chief of the Division of Economic Evidence and Reports of the Federal Trade Commission and Economic Adviser to the Bureau of Litigation of that Commission. Among his numerous publications are such basic textbooks as Cases on Public Utility Regulation and The Economics of Public Utility Regulation (R. 201-202).

exhibit demonstrated that if the new Yuma station's signals would replace those of appellant's station KIVA, 8,211 persons of 38,383 persons now receiving Grade A service (over one-fifth) from KIVA would lose such service and that of the 97,460 persons within KIVA's Grade B contour, 60,465 persons (two-thirds) would be totally deprived of all television service (R. 356). Valley contended that these facts clearly established the necessity of a Carroll hearing, and that, under the circumstances, the public interest required a hearing, even on the Commission's own motion, irrespective of Valley's rights.

On November 27, 1963, Intervenor, the assignee of the KBLU-TV construction permit, filed an application for license to cover its construction permit in which it alleged that construction was completed by the new permittee on November 19, 1963. Although acceptance of the license application was announced on December 5, 1963, no Commission announcement was made of the fact that Intervenor received program test authority, equal to a temporary license to operate on a regular commercial basis,¹ on December 2, 1963. By the time the Commission denied Valley's petition for reconsideration, on December 9, 1963, (91 days after its filing), KBLU-TV was on the air. The CBS network transferred its affiliation from appellant's station to KBLU-TV.²

¹ Cf. Queen City Broadcasting Co., 17 Pike & Fischer Radio Reg. 1 (1958).

² As the Motion for Stay filed by appellant in this Court demonstrated, KIVA's monthly network revenue loss, since its loss of the CBS affiliation to intervenor and the loss of its ABC affiliation to one of the El Centro grantees', has been \$5,000. From March 1, 1962, to November 30, 1963, KIVA lost \$45,711. Appellant also attached a cancellation letter by one of its former local advertisers (representing \$3,600 revenue per year) which transferred its account to intervenor. It should be stressed that these new developments were not before the Commission at the time its decisions in this case were made; only the facts submitted showing that such future development would occur were available to it or to appellant at the time.

The Commission's December 9, 1963, Memorandum Opinion and Order (R. 387-391) reaffirmed its view that allegations of injury to the public interest in this case arose from the economic impact of the original grant of a permit and that, therefore, such allegations cannot appropriately be raised by a petition to deny a subsequent assignment application. It further ruled that even if this purported challenge to the assignment applications were to be regarded as timely, the material submitted with Valley's petition for reconsideration should have been submitted by the petition to deny. Finally, the Commission concluded that the material submitted in the petition for reconsideration did not present matter sufficiently compelling to justify action by the Commission on its own motion. On December 10, 1963, this appeal followed.

SUMMARY OF ARGUMENT

Appellant asserts that the establishment of a new television station in the Yuma - El Centro area would impair and degrade appellant's service and drive appellant's station off the air. Because of the degradation of appellant's service and because of the much smaller coverage area of intervenor's station, the demise of KIVA, eo ipso, would cause an injury and loss of service to the public. The possibility of private injury, which affords appellant's undisputed standing is, therefore, equal to the possibility of public injury. The injury was threatened by the assignment of an empty permit to construct a new station from one who did not build the new station to another who was willing and able to build and establish that station. Therefore, it was inconsistent and arbitrary for the Commission to concede that appellant had standing to protest on grounds that its injury flows from the assignment, and to deny the protest on grounds that the public injury does not flow from the assignment.

Section 310(b) of the Communications Act provides that all assignment applications must be treated as new applications filed under Section 308 of the Act. Applications filed under Section 308 of

the Act can be protested pursuant to Section 309 of the Act. Section 309 provides that the Commission shall designate such protested application for hearing unless it finds that no material issues are presented and that the grant of the application would not be inconsistent with the public interest. If, for the stated reasons, no hearing is held, the Commission must issue a statement disposing of all substantial issues raised by the protest.

In the instant case, appellant's protest raised the following questions: Can the Yuma - El Centro area support appellant's KIVA, the intervenor's station and two other new stations in El Centro without a degradation or destruction of service to the public (Carroll issue)?¹ If the area cannot support all of these new stations, then the new stations are mutually exclusive with each other on economic grounds (Ashbacker issue).² Moreover, since two different communities are involved, i.e., Yuma, Arizona, and El Centro, California, a further determination should be made under Section 307(b) of the Act, requiring fair, efficient and equitable distribution of radio service among the several states and communities as to which of the communities the new station, if any, should be assigned (§307(b) issue).³ Furthermore, since all of the new stations relied for their revenue estimates on substantially the same revenue source, without regard for competition with each other, the question arose whether intervenor's and the El Centro grantees' revenue estimates, on which their financial qualifications depend, were reasonable. If they were not, there is a question as to whether these potential licensees could operate their stations as proposed (Ross issue).⁴

¹ Carroll Broadcasting Company v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F. 2d 440 (D.C. Cir. 1958).

² Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327, 66 S.Ct. 148, 90 L. Ed. 108 (1945).

³ 49 Stat. 1475 (1936), 47 U.S.C. §307(b).

⁴ William L. Ross, 25 Pike & Fischer Radio Reg. 360 (1963).

The facts raising the above questions were in dispute. Moreover, these questions clearly indicated that a grant of the application might well be inconsistent with the public interest. Therefore, according to Section 309(d)(2), a hearing should have been held before a decision was rendered. Even assuming, arguendo, that no hearing was required, the Commission should have disposed of the above issues in a statement. Its decisions, however, do not dispose of these questions.

Appellant's pleadings followed the same general economic theory and alleged facts at least as specific as did economic protestants in previous cases in which the Commission designated hearings on the Carroll issue. The standards of pleading, which the Commission contended appellant failed to achieve in its petition to deny, have never been previously applied. To deny appellant's relief on that basis was arbitrary and contrary to law. Therefore, the Commission was foreclosed from raising the question of timeliness with respect to appellant's petition for reconsideration which was timely filed under Section 405 of the Act, and in which appellant "pleaded its evidence" (as erroneously required by the Commission's August 9, 1963, order) in support of its previous allegations concerning the economics of the Yuma - El Centro television market. The pleadings submitted were, therefore, both timely and sufficient to require consideration of the appellant's protest on its merits.

But even assuming, arguendo, that appellant's pleadings were either so untimely or insufficient as to merit no consideration as a matter of right, they contained material so compelling in demonstrating the existence of the above public interest issues, all flowing from the injurious economic impact of the grants in question, that the public interest required the Commission to designate the applications for hearing, regardless of appellant's private rights. The Commission's blind defense of its prior grants rather than its required defense of the public interest leaves these problems unresolved. The record before

this Court is thus inadequate to support a conclusion that the public interest was served by the contested grants.

ARGUMENT

I. The Commission's Action in Denying Appellant's Requests for Relief on Grounds of Failure to Allege a Timely or Sufficient Prima Facie Case Of Economic Injury Was Erroneous in Fact and Law.

A. Since the Injury to Appellant and to the Public Is Threatened by the Same Application, the Commission's Holding That Appellant Has Standing but That It Failed To File a Timely Protest Is Inconsistent and Erroneous in Fact and Law.

Appellant takes the position that the establishment of a new television station in Yuma would result in destructive economic competition ruinous to appellant and inimical to the public interest. In this connection, it should be emphasized that injury to appellant and injury to the public are identical and co-extensive since, as appellant's pleadings demonstrated, the destructive competition from a new station would inevitably cause a degradation in appellant's service to the public and would drive appellant off the air. When this occurs, large segments of the public will lose their only existing television service — a loss which would not be replaced by Intervenor's new station. For these reasons, appellant filed a petition to deny the assignment of a permit to construct a new television station in Yuma, stating that the assignee of the permit (which had lain fallow in the hands of the original permittee) would build and establish the new station in Yuma whereas the original grantee would not have done so. The Commission held that appellant had standing because there was a causal connection between the injury complained of (economic injury to appellant) and

the assignment application protested.¹ The Commission then denied the protest holding that, there being no causal connection between the injury complained of (injury to appellant and to the public) and the assignment application protested, the protest was untimely.² Thus, in order to predicate a denial of the protest on grounds of untimeliness, the Commission had to deny the very fact which it had already admitted as true in finding appellant "a party in interest" and "a party aggrieved or adversely affected."³

Never during its long and bitter fight against its duty to take into account the possible adverse economic impact of new broadcast

¹ The Commission's August 9, 1963, decision said:

"Petitioner's [appellant's] allegation that the construction of Station KBLU-TV will result in the loss of network affiliation and will endanger limited advertising revenues, demonstrates that construction of said station is likely to affect the economic interests of petitioner. The permittee's failure to demonstrate financial ability to construct without the proposed assignment, and statements made by the permittee for KBLU-TV that construction will commence upon the grant of the assignment application, that the lease for the transmitter site is contingent on a proposed assignment, and that construction has been delayed by the withdrawal of Mr. Langill indicate that a grant of the assignment applications will increase the likelihood of early construction of Station KBLU-TV, and that, therefore, petitioner is a party in interest with regard to the assignment applications." (R. 160-161)

² The Commission's December 9, 1963, decision said:

"The Carroll issue cannot appropriately be directed to an assignment application when the petitioner alleges public interest issues which arose from the impact of the original construction permit for the station and not from the assignment application attacked by the petitioner." (R. 389)

³ The terms "party in interest" (47 U.S.C. §309) and "a person aggrieved or adversely affected" (47 U.S.C. §405) have been interpreted as being synonymous. Camden Radio Inc. v. FCC, 94 U.S. App. D.C. 312, 220 F. 2d 191 (D.C. Cir. 1954) reh. den. March 17, 1955; Metropolitan Television Co. v. United States, 95 U.S. App. D.C. 326, 327; 221 F. 2d 879, 880 (D.C. Cir. 1955).

license grants ¹ has the Commission committed such a glaring contradiction in its findings.

¹ E.g. the Commission had held in the past that no law, rule or policy required that a definite need support the grant of a new application (F.W. Meyer, 7 FCC 551 [1939]) and that a licensee, who only complained of the adverse economic impact of the new license grant, had no standing to seek court review of the Commission's decision denying his economic protest (FCC v. Sanders Bros. Radio Station, 309 U.S. 470 [1940]). And even though in the Sanders case the Supreme Court indicated that in cases where both the existing station and the new station may go under as a result of destructive economic competition, a vital public interest question, properly subject to the Commission's consideration, is present, the Commission continued to deny economic protests on grounds that the consequences of competition were speculative, impossible to predict (Voice of Cullman, 14 FCC 770 [1950] and Montana Network, 6 Pike & Fischer Radio Reg. 445 [1950]. "incapable of proof" (American Southern Broadcasters, 11 Pike & Fischer Radio Reg. 1054, 1056 [1955]), and, therefore, even if the Commission had power to consider it, which power it disclaimed (Southeastern Enterprises, 13 Pike & Fischer Radio Reg. 139, 147 [1957]), it would not do so as a matter of policy (Voice of Cullman, *supra*; Kaiser Hawaiian Village Radio, Inc., 15 Pike & Fischer Radio Reg. 84(a) [1957]). In answer to this Court's decision in Camden Radio, Inc. v. FCC, *supra*, reh. den. March 17, 1955, that an existing licensee has standing to protest the assignment of a permit to construct a competitive station, without the need to show that the injury, which affords it standing, flows from the assignment itself, the Commission next attempted to deny an economic protest on grounds that while protestant had standing, protestant's pleadings indicated that he would be of no help in determining whether the public interest would be served by the new grant. Elm City Broadcasting Corp. v. United States, 98 U.S. App. D.C. 314, 235 F. 2d 811 (D.C. Cir. 1956). The Commission also undermined the impact of the Carroll case (Carroll Broadcasting Company v. FCC, 103 U.S. App. D.C. 346, 258 F. 2d 440 (D.C. Cir. 1958)), wherein this Court held that where a protestant offers to prove facts showing destructive economic injury which spells a loss of service, he must be afforded an opportunity to prove his case and the Commission should make findings on such proof. First, economic protests were discouraged by calling a protestant's renewal application up for early comparative consideration with the new application (Herbert P. Michels, 17 Pike & Fischer Radio Reg. 557 (1958)), and later, as in this case, by applying unannounced high standards of pleading (virtually requiring the pleading of evidentiary facts) to economic protests. Missouri-Illinois Broadcasting Co., 1 Pike & Fischer Radio Reg. 2d 1 (1963), now on appeal in this Court *sub. nom.* KGMO Radio Television, Inc. v. FCC, Case No. 18,064; KXO-TV, Inc., 1 Pike & Fischer Radio Reg. 2d 125 (1963), now on appeal in this Court *sub. nom.* Valley Telecasting Co., Inc. v. FCC, Case No. 18,092.

Appellant's action in petitioning to deny the assignment of permit application was in accord with the Commission's holding in Boise Broadcasting Associates, 20 Pike & Fischer Radio Reg. 1109 (1960). There the Commission warned that a causal relationship must be shown between the protested action and the alleged injury. In that case, an existing station's protest against the assignment of a permit for a competitive station was dismissed by the Commission, on the following grounds:¹

"It is not alleged, for example, that any increase in competition will result from the protested assignment, or that the proposed station is more likely to be built, or that the station will be constructed and placed in operation quicker under the proposed assignment, or that construction costs will be reduced, thus enhancing the financial position of the proposed competitor. . . . It must be shown that the Commission's grant of the latter assignment will, by increasing the likelihood of competition, or in some other manner, adversely affect the protestant's interest."

In the instant case, appellant did exactly as commanded by Boise. In fact, it is apparent that while the previous permittee did not construct from the date of its grant, July 25, 1962, to the date of the consummation of the assignment, on August 29, 1963, after the consummation of the assignment, and while appellant's petition for reconsideration was pending, the new assignee, intervenor, managed not only to construct and test the station, but actually put it on the air on December 2, 1963. The increased likelihood of construction, therefore, was not only properly alleged by appellant, but the history of events dramatically shows that appellant's allegations were correct. The causal connection between the action protested, the assignment, and the alleged economic injury is therefore indisputable.

¹ 20 Pike & Fischer Radio Reg. at 1114 (1960).

It is, of course, recognized that the allegations necessary to constitute one "a party in interest", so as to afford it standing to protest, no longer necessitate a hearing on the merits of the protest in all instances. The absolute hearing right of a party in interest has been limited by the 1956 and the 1960 amendments to Section 309 of the Communications Act.¹ It is theoretically conceivable, therefore, that the Commission could find a protestant to have standing and, nevertheless, deny the merits of such protests in cases where a different showing is required for the two purposes.² Yet, where, as here, in finding standing

¹ 70 Stat. 3 (1956) and 74 Stat. 889 (1960), discussed infra.

² E.g., Philco Corporation v. FCC, 103 U.S. App. D.C. 278, 257 F. 2d 656, 659 (D.C. Cir. 1958), cert. den. 358 U.S. 946. However, such cases are rare because in most of those cases which turned on the protestant's inability to relate the reasons for its standing with the public interest considerations advanced to defeat the grant, the protest was dismissed or denied on the grounds of protestant's lack of standing. Cf. Tennessee Television, Inc. v. FCC, 104 U.S. App. D.C. 316, 262 F. 2d 28 (D.C. Cir. 1958) (protestant claimed standing on grounds that it was a losing comparative applicant for a permit sought to be modified, but the technical changes proposed by the modification application did not alter applicant's comparative qualification); Time, Inc., 15 Pike & Fischer Radio Reg. 281 (1957) (electrical interference caused to protestant's station by another existing station held no ground for imposing conditions on the latter's application for consent to transfer control of its corporate licensee); Boise Broadcasting Associates, 20 Pike & Fischer Radio Reg. 1109 (1960) (failure to show that assignment of license of an existing competing station would increase the likelihood of competition affords no standing to protesting competitor). The reason for this phenomenon was succinctly stated by the Commission in Midwest Television, Inc., 9 Pike & Fischer Radio Reg. 611, 614 (1953):

The significance of a clear showing of causal relationship between the action being protested and the alleged economic injury cannot be minimized in this or any similar case since it is a jurisdictional factor which determines whether the protestant has shown standing as a party in interest to protest.

In the Midwest case, the Commission granted the economic protest of a permittee of a television station in a city which might be expected to receive coverage from a station 42 miles away. The protestant contested the distant station's application to modify its facilities, even though the protest was unclear

the Commission admits and concedes causal connection between the assignment of the permit and the economic injury complained of, it is totally inconsistent and arbitrary thereafter to deny the protest as untimely on the very ground that no causal connection exists between the assignment of the permit and the injury. This reason alone merits reversal and remand.

B. Since Appellant's Protest Raised Material and Substantial Questions of Fact and Presented Matters Showing that the Grant of the Assignment Application Would be Inconsistent with the Public Interest, the Commission Erred in Failing to Designate the Application for Hearing and in Failing to Dispose of the Issues Raised.

Proceeding from that portion of the contradictory decision which is correct, namely, that appellant has standing,¹ a review of Section 309

[Footnote 2, page 18, continued]

as to how much of the injury complained of was caused by the original grant and how much by the modification. Yet, the above dictum became a part of the Commission's institutional form language for denying similar or even stronger protests.

The logical parallel between the standing of the protestant and the sufficiency of his protest is, perhaps, best illustrated by the two Interstate cases. In Interstate Broadcasting Company v. FCC, 108 U.S. App. D.C. 78, 280 F. 2d 626 (D.C. Cir. 1960), this Court affirmed the Commission's dismissal of an economic protest for lack of standing because the protestant's allegations concerning the loss of an unspecified number of listeners outside of its normally protected contour, as a result of co-channel electrical interference, was held insufficient to constitute the averment of aggrievement. The same protestant's more specific statement of injury concerning interference from another station, however, was held to bestow standing to protest and the Commission's dismissal of the protest was reversed. Interstate Broadcasting Company v. FCC, 109 U.S. App. D.C. 190, 285 F. 2d 270 (D.C. Cir. 1960).

¹ Camden Radio, Inc. v. FCC, supra. See also Sections 310(b) and 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §310(b), 309(d)(1) set forth in the Appendix.

of the Act reveals that the Commission's orders dealing with appellant's petitions fall far short of complying with the statutory command.

As indicated above, until the 1956 amendment to Section 309(c) of the Communications Act, a "party in interest" had absolute rights to a hearing and for intervention therein.¹ However, 70 Stat. 3 (1956) provided, in essence, that when a protest showed protestant to be a party in interest and specified with particularity the facts relied upon as showing that the grant was improperly made or would otherwise not be in the public interest, the Commission had to designate the protested application for hearing "except with respect to such matters as to which the Commission, after affording protestant an opportunity for oral argument, finds, for reasons set forth in the decision that, even if the facts alleged were² to be proven, no grounds for setting aside the grant are presented.

74 Stat. 889 (1960), which amended Section 309 of the Act to its present form, and which provided for pre-grant protests by "petitions to deny," eliminated the requirement for oral argument under the circumstances which required such an argument under the above 1956 amendment. Section 309(d)(2) of the Act now permits the Commission to rule on a petition filed under Section 309(d)(1) without a hearing only where it finds (1) that no substantial and material question of fact is presented and (2) there is no reason why the grant of the application protested would be inconsistent with the public interest. If either of these circumstances is present, a hearing is mandatory. Hudson Valley Broadcasting Corporation v. Federal Communications Commission, ___ U.S. App. D.C. ___, 320 F. 2d 723 (D.C. Cir. 1963). If the Commission is able to deny a protest without hearing, it must "issue a concise

¹ See Camden Radio Inc. v. FCC, and Elm City Broadcasting Corp. v. United States, p. 16, note 1, supra.

² The full text of the amendment is set forth on pp. A-8 - A-10 of the Appendix.

statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition."¹

On the basis of a carefully researched, expert economic analysis, appellant alleged that the economic development of the Yuma-El Centro area shows but a modest rate of growth which cannot be expected to continue even at its present level in the future. Intervenor alleged that the economics of that market shows a tremendous upswing which will continue inexhaustably in the indefinite future. Intervenor urged that the future should be projected on the basis of percentage growth figures. For example, consider the 87% rate of increase in government employment between 1950 and 1960 in Yuma County. Appellant urged that the percentage figures misrepresent the real state of affairs. An 87% increase would bring government employment in Yuma County to only 2,957 persons in 1960--certainly not a significantly large number. Appellant alleged that the market cannot support a new television station for five to ten years hence. Intervenor alleged that the market can now support several new stations. Appellant showed facts demonstrating that the establishment of a new station in the market would cause loss of service to the public. Intervenor joins issue on that point. A perusal of the lengthy pleadings, joiners and rejoinders, whose essence will be reprinted in the Joint Appendix, makes it obvious that serious, material and substantial factual disputes were presented to the Commission by the appellant and the intervenor, which, in final analysis, revolved around the essential economic question as to whether or not the area can support a new station without degradation or destruction of service contrary to the public interest as enunciated in Carroll Broadcasting Co. v. FCC, 103 U.S. App. D.C. 346, 258 F. 2d 440 (D.C. Cir. 1958).

Intervenor claimed that it will need \$90,000 in revenues during its first year of operation. The revenue requirement of the two El Centro

¹ The text of the appropriate portions of the present Section 309 is set forth in the Appendix.

stations is stated by them at an additional \$257,000 per annum (\$130,000 and \$127,000 respectively). For the new stations to survive, therefore, the Yuma-El Centro market must produce an additional \$347,000 annual television revenue. The actual operating income of appellant's Station KIVA, less profit and before Federal tax, was \$376,000 in 1962. The total revenue requirements of the four stations in Yuma and El Centro are, therefore, \$723,000. At this figure KIVA could not earn a profit. Since it was recognized that two stations would produce more revenue than KIVA alone, appellant's economic consultant projected a \$464,783 estimated revenue availability if Yuma-El Centro were a two station market. This amount would not provide for KIVA and for another viable station.

Moreover, the further division of the available audience among more than two stations would inevitably cause declining advertising rates since advertisers would pay more for a single station serving the entire market than for one out of three or four stations in the market which must share the audience with its competitors. Thus, the total projected television revenue in Yuma-El Centro as a three or four station market was found to be \$419,858 per annum. This is about \$300,000 short of the total requirement for the four stations. Thus, some, if not all, of the stations would fail. Under the doctrine of the Sanders and Carroll cases, station failures are matters of purely private concern when no service to the public is effected (e.g. when service from station A is being replaced by similar service from Station B.) As shown by appellant's engineering statement, this would not be the case here. The demise of KIVA, whose service would not be replaced by any of the new stations, would cause a loss of service to the public.

Time and again appellant offered to prove the injury to itself, and to the public, which would flow from the grant of the assignment application (as opposed to the grant of the original permit to an applicant

unwilling or unable to establish the new station). Appellant offered to assume the burden of proof in a hearing (R. 146, 178). Yet, when ruling on the merits of the petition, the Commission picked and chose among the facts, assumed intervenor's statements as true and significant, held appellant's allegations to be untrue or insignificant, and disregarded some other issues completely. As this Court enunciated in Hudson Valley Broadcasting Corporation v. FCC, ___ U.S. App. D.C. ___, 320 F. 2d 723, 727 (D.C. Cir. 1963), the Commission cannot treat widely divergent factual allegations by a selective, composite finding of facts which purportedly support the grant of the protested application. The Commission was not justified in concluding that no substantial and material questions of fact were presented. Therefore, the Commission was foreclosed by Section 309(d)(2) from denying the protest without hearing. It should have ruled on the disputed factual issues only after a hearing.

As previously stated, the other circumstance under which the Commission cannot deny a protest without hearing under Section 309 (d)(2) is where it is unable to find that the grant of the application would be consistent with the public interest. And Section 309(d)(2) makes it clear that such finding must be based on "the application, the pleadings filed, or other matters which it may officially notice." In short, as the Court explained in Hudson Valley Broadcasting Corporation, *supra*, "to grant an application without a hearing, the Commission must find (1) no material issues of fact, and (2) no reason why the grant would not serve the public interest, convenience and necessity."¹ The Commission's findings in the instant case, contradictory even after its selective ruling on disputed facts, shows an attempt, at best, to fulfill only the first, not the second obligation. In fact, it fulfilled neither.

¹ 320 F. 2d at 727.

For instance, the Commission did not find that economic mutual exclusivity, requiring a hearing under Ashbacker Radio Corp. v. FCC, 326 U.S. 327,¹ is not raised by the assignment application and by the newly granted El Centro permits, although each of those new stations would operate within KIVA's coverage area and would compete for revenue, at least partially, in the same geographic area. (See maps, R. 361-364). Appellant's pleadings are spotted with references to the Ashbacker problem of mutual economic exclusivity.² Yet the Commission did not dispose of the Ashbacker question.

The Commission did not find, in light of all the competitive circumstances, which indisputably involve the two new El Centro grants, that the revenue estimates for intervenor's station, upon which the permittee's financial qualifications depend, were reasonable, and that, therefore, the likelihood that the permittee would operate as proposed in its application is favorable. In contrast, consider the Commission's action in William L. Ross, 25 Pike & Fischer Radio Reg. 360 (1963), wherein a petition setting forth economic facts concerning the market for which a new station application was pending was held insufficient to raise a Carroll issue but sufficient to raise the question concerning the reasonableness of revenue estimates so as to warrant a hearing. In that case the Commission also held that the doubt as to revenue sufficiency raised a question of the applicant's ability to operate as proposed.

Had the Commission recognized, rather than ignored, the issue of economic mutual exclusivity, it would have had to face the additional problem of Section 307(b) of the Act. This section requires the "fair, efficient, and equitable distribution" of broadcast licenses "among the

¹ See also Delta Air Lines v. CAB, 97 U.S. App. D.C. 46, 228 F. 2d 17 (D.C. Cir. 1955).

² R. 36, 41, and in the pleadings filed concerning the El Centro grants, now part of the record before this Court in Valley Telecasting Co., Inc. v. FCC, Case No. 18,092.

several States and communities." Under this section, if the Commission had proceeded properly, after finding the stations to be economically mutually exclusive, it should have decided whether El Centro or Yuma should receive priority in the distribution of the new facilities. Easton Pub. Co. v. FCC, 85 U.S. App. D.C. 33, 175 F. 2d 344 (D.C. Cir. 1949). Even if we assume, arguendo, that these vital issues could be decided without a hearing, at the very least they merited "disposition" under the governing statute. The failure to find facts and to set them forth succinctly so as to support the Commission's conclusion that the grant was in the public interest required a remand in the Easton, Carroll and Hudson Valley cases, supra. A similar failure requires a remand of the instant case.

- C. Appellant's Petition to Deny, was Sufficient to Allege a Prima Facie Case of Destructive Economic Injury Requiring a Hearing but, in Any Event, Since the Commission's Own Arbitrary Action of Applying New and Unannounced Pleading Standards Forced Appellant to "Plead Its Evidence" in a Timely Filed Petition for Reconsideration, the Commission is Foreclosed From Raising the Question of Timeliness With Respect to Such Evidentiary Facts.

The Commission's second allegation of untimeliness is based on the contention that the evidentiary facts which appellant set forth as part of its petition for reconsideration should have been submitted with the original petition to deny the assignment application (which in turn was held untimely on the theory, discussed above, that it should have been submitted with a petition to deny the original application for permit by

the assignor).¹ As was set forth in appellant's petition for reconsideration, however, it did not "plead its evidence" in its petition to deny because it had no notice that such a strict standard of pleading was required. In fact, all Commission precedents (which appeared properly to interpret the statutory standard and the courts' interpretation thereof) indicated that much scantier allegations than those made by appellant were sufficient to raise an economic issue to merit a Carroll hearing.

In the Carroll case this Court held that "when an existing licensee offers to prove that the economic effect of another station would be detrimental to the public interest, the Commission should afford an opportunity for presentation of such proof. . . ."² In fact, the Court remanded that case for further findings even though "Carroll did not cast its offer of proof exactly in terms of the public interest."³ The

¹ It should also be pointed out, *passim*, that the Commission's claim, that appellant did not raise objections to the original grant, is somewhat misleading. As recited in the Statement of the Case, appellant did file a petition to deny an application of The New England Industries, Inc. for Channel 13 in Yuma, which application was mutually exclusive at that time with the application of the ultimate grantee (intervenor's predecessor permittee for Channel 13). The petition was withdrawn when it became apparent that a protracted comparative hearing would be held between the rival Channel 13 applicants. When the New England Industries application was withdrawn, the time for filing a petition to deny against the other application under Section 1.359(i) of the Commission's rules had passed.

Section 1.359 of the Commission's rules (now 47 C.F.R. §1.580) which implements the protest provisions of Section 309 of the Act, 47 U.S.C. §309, states that petitions to deny can be filed only within 30 days after public notice of the acceptance for filing of applications subject to such petitions, except for AM and license renewal application. See 47 C.F.R. §1.580(i). The acceptance of Desert Telecasting Company's application for Channel 13 in Yuma was announced on November 9, 1961, and the dismissal of New England's application for that channel was not announced until June 5, 1962. Thus, the 30-day period within which to protest the Desert application had long expired.

² 103 U.S. App. D.C. at 349, 258 F. 2d at 443.

³ 103 U.S. App. D.C. at 350, 258 F. 2d at 444.

Court's mandate was correctly interpreted by the Commission in Martin Karig, 19 Pike & Fischer Radio Reg. 1084 (1960) in which protestant's financial allegations which justified a Carroll hearing, and which closely resembled the line of appellant's reasoning, were summarized as follows:¹

. . . Petitioner further contends that its annual revenue for the three years 1956, 1957, and 1958 was \$119,000 and that it must do an annual volume of about \$104,000 to break even. Petitioner estimates that the gross potential revenue of standard broadcast stations in the communities involved is approximately \$160,000, and based upon this estimate it alleges that if a new station collects an annual revenue of \$72,000 from this area, as forecast by the applicant, the petitioner's operating loss will approximate \$16,000 a year. This, argues WENT, ". . . would result only in a drastic impairment of the valuable public service which has now for several years been established by WENT. Should there be a division of the field, such public service could not possibly be adequately maintained."

Affirming its decision on reconsideration, the Commission held as follows:²

The Bureau asserts in substance that WENT in its November 16, 1959 petition, failed to allege facts which show a detriment to the public interest as opposed to a mere economic injury to WENT, and that absent such showing there is no basis for enlarging the issues to include the economic issue. The Bureau cites the Carroll case as authority for its view. Although the factual allegations in WENT's November 16, 1959 petition were not set forth succinctly, sufficient facts

¹ 19 Pike & Fischer Radio Reg. at 1084-1085.

² 19 Pike & Fischer Radio Reg. 1086.

were alleged by WENT to permit an inference that it was offering to "prove that the economic effect of another station would be detrimental to the public interest." Carroll Broadcasting Co. v. FCC, *supra*. In accordance with the decision in Carroll, we therefore granted WENT's request in order to accord to it the opportunity of showing that the licensing of another station would be detrimental to the public interest. Under the Carroll decision the burden of making such showing is, of course upon WENT. (Emphasis supplied; Footnote omitted.)

Appellant's clearly worded offers in the instant case certainly did more than "permit an inference" that appellant was offering to prove economic damage detrimental to the public interest. Nor was there present in *Karig* the aggravating circumstance here presented, i.e. that the existing station here is protesting the establishment of not one but several new stations in its coverage area, thereby raising Ashbacker questions of mutual exclusivity and Section 307(b) questions concerning the fair and efficient distribution of broadcast authorizations. Yet, compare the treatment accorded appellant.

In *Haggard & Rogers*,¹ protestant merely filed letters with the Commission alleging economic injury to himself, without even requesting any specific relief. The essential statements there were that protestant's station in a neighboring community was a loss operation; that in 1952, another station failed in the community where applicant wished to establish the new station; that the protestant's station was operating with a reduced staff because of the economic conditions in the area and that the Secretary of Agriculture had declared the region a depressed area. The Commission's reaction to this showing follows:²

¹ 24 Pike & Fischer Radio Reg. 670 (1962).

² 24 Pike & Fischer Radio Reg. at 672.

4. Although the petitioner is quite vague, we believe that he has made the minimum allegations required under the Carroll case to warrant a hearing on the question of whether there are adequate revenues available to support more than one standard broadcast station in the area without loss or degradation of standard broadcast service. Accordingly, such an issue will be specified. The burden of proceeding with the introduction of evidence and the burden of proof on this issue will be placed upon the petitioner. (Footnote omitted; emphasis supplied.)

In Bigbee Broadcasting Co.,¹ protestant, the only AM station in Demopolis, Alabama, objected to a grant of another AM station in Demopolis. Protestant showed that Demopolis had a population of less than 8,000 of which 50% had sub-standard income; that the population was declining in the neighboring counties; that seven other stations also covered Demopolis and its environs, and that protestant had made only a nominal profit. Reciting these allegations of protestant and the contents of the applicant's reply, the Commission concluded: "We are of the opinion that WXAL [protestant] has met the burden so that a Carroll issue is required."² Similar showings were found to be sufficient to justify Carroll issue hearings in Geoffrey A. Lapping, 23 Pike & Fischer Radio Reg. 919 (1962); John Self, 24 Pike & Fischer Radio Reg. 1177 (1963); Rhineland Television and Cable Corp., 24 Pike & Fischer Radio Reg. 1181 (1963).³ Many of these cases, of course, involved AM stations, whose cost of operation is substantially lower than that of television stations. Moreover, while they involved small communities, Yuma-El Centro is a small market for one VHF station, let alone four. Even the nation's capital has only four VHF stations. Apart from this variance in the proportion of the showing, the only valid distinction that can be

¹ 24 Pike & Fischer Radio Reg. 497 (1962).

² Id. at 499.

³ See the dissent of Commissioner Cox in Missouri-Illinois Broadcasting Co., 1 Pike & Fischer Radio Reg. 2d 1, at 5-10, discussing these cases.

drawn between these cases and the instant one is that appellant here made a more complete and detailed showing than the protestants in the prior cases who succeeded in obtaining a Carroll hearing.

Appellant does not argue here that the Commission is not entitled to change its pleading standards or that the doctrine of stare decisis necessarily binds the Commission's actions. It is contended here that to change the standard of pleading required by prior cases, without previous notice such as required in rulemaking under the Administrative Procedure Act, 5 U.S.C. 1001, et. seq., or by a prior published policy pronouncement, is arbitrary and capricious. It is also contended here that when the Commission's own prior pleading standards, on which appellant justifiably relied, were the reason why more detailed evidence was not pleaded before, the Commission's rejection of such detailed evidence submitted in a timely filed petition for reconsideration in a matter over which the Commission still had full jurisdiction,¹ is so arbitrary and capricious² as to merit reversal for that reason alone.

The Commission's finding of insufficiency in its August 9, 1963, order is based on two cases there cited: Tree Broadcasting Co., 1 Pike & Fischer Radio Reg. 2d 15 (FCC Review Board decision, released July 23, 1963) and Radio South, Inc., 21 Pike & Fischer Radio Reg. 547 (1961). The Tree decision, insofar as it announced new pleading standards after the filing of appellant's petition to deny, provided no guidance to

¹ Compare Enterprise Company v. FCC, 97 U.S. App. D.C. 374, 231 F. 2d 708 (D.C. Cir. 1955) cert. den. 351 U.S. 920 (1956).

² As Commissioner Cox stated in his dissent in Missouri-Illinois Broadcasting Co., 1 Pike & Fischer Radio Reg. 2d 1, 9: "The essence of arbitrariness is to treat similar situations differently."

appellant in drafting its petition to deny.¹ In Radio South, an existing station protested the license assignment of another existing rival station. The Commission held that since the assignment did not increase the likelihood of competition, the allegations of the protest were insufficient to afford protestant standing to protest. In the instant case, however, protestant's standing was not questioned because the increased likelihood of competition resulting from the assignment was recognized. Therefore, appellant's pleadings surmounted the hurdle of pleading sufficient standing. Thus, Radio South, where this was not done, affords no guidance as to what additional facts must be pleaded to prevail on the merits.

The Commission's unjustified rulings that appellant's petition to deny did not make out a prima facie protest and that appellant's petition for reconsideration supplied material too late for Commission consideration, are contrary to judicial and administrative precedents, and represent arbitrary and capricious acts requiring reversal and remand.

¹ Appellant's petition for reconsideration filed 17 days after the Tree decision, however, did meet the new standards. Indeed, the Commission's order denying the petition for reconsideration did not claim that the latter had failed to meet the new standards. Instead, it held that the new allegations did not raise matters so compelling as to call for action on the Commission's own motion.

II. The Public Interest Required that the Commission Consider Appellant's Petition for Reconsideration at Appellant's Instance, and Any Material Available to it Concerning the Effect of the Establishment of a New Television Station in Yuma, on Its Own Motion, Regardless of the Timeliness or Sufficiency of Appellant's Petitions.

The Commission's position, recapitulated, is this: Appellant's petition to deny was filed too late to defeat, on its merits, the assignment application. Moreover, even overlooking its untimeliness, it was insufficient to raise an issue of public injury. And, without ruling on whether appellant's petition for reconsideration would have been sufficient for raising such public interest considerations, the petition for reconsideration submitted material too late to merit a hearing as a matter of right. Furthermore, it did not present "matter so compelling as to call for action by the Commission, on its own motion."

It is appellant's contention that the Commission's entire chain of reasoning is wrong. However, assuming, arguendo, that appellant's petition to deny was, in fact, late and insufficient, and that its petition for reconsideration submitted new material too late to perfect the prior pleading as a matter of right, the Commission was nevertheless guilty of reversible error in failing to consider the petition for reconsideration on its merits, either at appellant's instance or upon the Commission's own motion.

As detailed before, appellant's petition for reconsideration contained a 147 page expert economic analysis which concluded:

The authorization at the present time of an additional television station in the Yuma-El Centro market fore-shadows such revenue inadequacies as to impair the quality and jeopardize the availability of television services to the public. (R. 211)

The above conclusion rests upon the amply documented and carefully researched facts that because of the limited water resources in the Yuma-El Centro area, no substantial further agricultural expansion is possible, although the economy of the area relies chiefly upon agriculture; that measured mostly in terms of population, households, retail sales, and net effective buying income, the KIVA coverage area compares very unfavorably with other multi-station markets; that the small business character of the market discourages local advertising and that the economic trends expressed in percentages are misleading because of the small original base of comparison. Moreover, the study shows that the potential of agriculture, mining, manufacturing, wholesale and retail trade, finance and government activities in the KIVA service area promises no more than a modest rate of economic growth. Further, Dr. Barnes' study of KIVA's business operations reaffirms KIVA's claim for high efficiency in exploiting the revenue potential of the market, although, despite such efforts, KIVA has failed to realize the revenues which comparable stations can and do obtain or comparable markets can and do furnish.

Based upon these facts and upon the reasonably predictable effects of competition, the Barnes Analysis concludes that the Yuma-El Centro market will be unable to support one additional station for perhaps five to ten years from the present. Moreover, the study discloses that the advent of a second station in the Yuma-El Centro area will inevitably result in substantial diversions of revenue from KIVA's presently thin earnings. According to Dr. Barnes, these diversions from KIVA's revenues would range from approximately \$160,000 to \$259,589 annually depending upon whether there is two or three station competition in the market. He predicts that KIVA would become a deficit operation within the first year of competitive operation and that diversions of revenue "of the magnitude predicted would almost inevitably foreshadow the disappearance of KIVA from telecasting."

The expert engineering exhibit attached to the petition for reconsideration demonstrated that if intervenor's station were to replace the operation of appellant's station KIVA, a serious degradation of existing service would occur. 8,211 persons would lose a Grade A or better service and 60,465 persons would lose a Grade B or better service. This results from the much smaller area which would be served by intervenor than is presently served by KIVA. Since KIVA's present Grade A coverage encompasses only 38,984 persons, a loss of 8,211 is a substantial one representing over 21% of the persons now receiving Grade A service from KIVA. Similarly, since the KIVA Grade B coverage includes a population of only 97,460, a loss of 60,465 persons represents a loss of monumental magnitude--approximately two-thirds of those now served.

Yet, the Commission disposed of the Barnes economic analysis and the expert engineering showing in one sentence, as follows (R. 391):

Although in our view the question of timeliness is decisive in this case, we have nevertheless examined the voluminous material submitted in the Petition for Reconsideration and have concluded that it does not present matter so compelling as to call for action by the Commission, on its own motion, designating the applications for hearing on the Carroll issue.

Section 1.84(c) of the Commission's rules to which the Commission's decision refers (recently renumbered as Section 1.106(c), 47 C.F.R. §1.106(c)) provides as follows:

"(c) A petition for reconsideration which relies on facts which have not previously been presented to the Commission or to the designated authority, as the case may be, will be granted only under the following circumstances:

- "(1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters;
 "(2) The facts relied on were unknown to petitioner until after his last opportunity to present such matters, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or
 "(3) The Commission or the designated authority determines that consideration of the facts relied on is required in the public interest." ¹

As was stated by this Court in Springfield Television Broadcasting Corporation v. Federal Communications Commission, ___ U.S. App. D.C. ___, ___ F. 2d ___, (D.C. Cir. 1964) (Case No. 17,957, decided January 9, 1964):²

. . . As we read Section 1.106(c) of the regulations, Paragraphs (1) and (2) do not serve as a bar to the Commission's consideration of the public interest determination required by Paragraph (3). In the interest of orderly procedure pursuant to the mandate of Congress, Paragraphs (1) and (2) of Section 1.106(c) outline considerations to be weighed, among others, in making the public interest determination of Paragraph (3).

In that case, the Court upheld the Commission's dismissal of an economic protest in which an existing station brought to the Commission's attention, for the first time on a petition for reconsideration, facts concerning the possible injurious impact of the Commission's grant of a television

¹ Section 1.16 of the Commission's rules (now remembered 47 C.F.R. §1.108) provides that the Commission may, on its own motion, set aside any action made or taken by it within 30 days after its publication.

² Slip opinion, pp. 5-6.

translator station. The Court rejected protestant's contentions that either Rule 1.106 was unlawful or that, under the circumstances, the Commission abused its discretion for its failure to grant a hearing under Section 1.106(c). The clear implication, however, is that Section 1.106(c), though valid, is not a clear charter for the Commission's blanket denial of all matters filed for the first time in petitions for reconsideration, without regard to the compelling nature of the public interest questions raised.

Indeed, in the Springfield case, it is not difficult to see why the Commission was persuaded not to reconsider. First, the translator did not compete with the protestant for advertising revenue; second, it was not shown to be operating within the protestant's coverage area; third, the Commission assured the protestant that it could also have a translator if it wished; and, finally, there was apparently no allegation of injury to the public as distinguished from injury to protestant. (Miller River Translators, Inc., 25 Pike & Fischer Radio Reg. 516 [1963]).

In contrast, the compelling nature of appellant's pleadings, and the important public interest issues raised by it, detailed above, clearly required the exercise of the Commission's discretion even assuming, arguendo, the lateness and insufficiency of appellant's pleading.

Moreover, even if it were assumed that appellant had, for the first time, set forth the Carroll, Ashbacker, Ross and 307(b) problems, and the supporting evidence, in its petition for reconsideration, such material, at the very minimum, constituted a "cause or circumstance first coming to the knowledge of the Commission since the granting of the permit" which in a proper exercise of the Commission's judgment should have barred the issuance of the operating authority, under Section 319(c) of the Act, 47 U.S.C. § 319(c). To issue such a temporary

license while the petition for reconsideration was still under consideration,¹ was a gross abuse of the judgment required by Section 319(c).

As the courts have repeatedly stated, in viewing the public interest, the Commission's vision is not to be limited to the horizons of the private parties to the proceeding.² The Communications Act is not designed primarily as a new code for the adjustment of private rights through adjudication. Therefore, when the Commission's power is invoked, its own power, rather than the private parties' rights should control the range of its investigation in ascertaining what is to satisfy the requirements of the public interest.³ And while a private party, who is a party in interest, has standing to appeal a Commission decision as a representative of the public interest,⁴ as a private Attorney General⁵ or "as a kind of King's proctor,"⁶ the Communications Act does not relegate the duty to vindicate the public interest solely to private parties or to adversary proceedings. The Commission itself is charged with

¹ It must be assumed that on December 2, 1963, when the operating authority issued, the Commission had not yet acted on the petition for reconsideration because, otherwise, the Commission would not have waited for the release of its decision until a day after the statutory 90 day period, within which such decision must be rendered, elapsed. (See 47 U.S.C. §405).

² FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940); Michigan Consolidated Gas Co. v. Federal Power Commission, 108 U.S. App. D.C. 409, 283 F. 2d 204 (D.C. Cir. 1960), cert. den. 364 U.S. 913; Clarksburg Pub. Co. v. FCC, 96 U.S. App. D.C. 211, 225 F. 2d 511 (D.C. Cir. 1955); Southwestern Publishing Co. v. FCC, 100 U.S. App. D.C. 251, 243 F. 2d 829 (D.C. Cir. 1957).

³ FCC v. Pottsville Broadcasting Co., 309 U.S. at 143.

⁴ Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470, 477; Scripps-Howard Radio v. Federal Communications Commission, 316 U.S. 4, 14.

⁵ Associated Industries v. Ickes, 134 F. 2d 694, 704 (2d Cir. 1943), vacated for other reasons, 320 U.S. 707.

⁶ Colorado Radio Corporation v. Federal Communications Commission, 73 U.S. App. D.C. 225, 118 F. 2d 24, 28 (D.C. Cir. 1941) (concurring opinion).

the ultimate duty to grant an application only if it can make the positive finding (with or without the assistance of adversary proceedings) that the public interest would be served by the grant. 47 U.S.C. §309.

The situation here is entirely different from that in Colorado Radio Corp. v. Federal Communications Commission, 73 U.S. App. D.C. 225, 118 F. 2d 24, on which the Commission's December 9, 1963, order relied. In Colorado Radio, the economic protestant, a party to a hearing, complained that the Commission failed to reopen the record, after a hearing, to adduce evidence of a changed condition which evidence was available to it earlier. The Court dismissed the appeal on grounds that protestant should have presented its full evidence at the hearing. In the instant case, the Commission denied appellant a hearing in which to introduce evidence of any kind. Moreover, the necessity of strengthening the pre-grant petition by evidentiary facts arose only because of the Commission's own action in applying new pleading rules retroactively. Colorado Radio Corp., supra, therefore, does not apply here. In fact, the Commission's claim of untimeliness in this case arises only because of appellant's timely attempt to meet the Commission's untimely adoption of new and arbitrarily applied standards.

It should also be pointed out that in a case more recent than Colorado Radio, this Court made it clear that the public may require an administrative agency to consider new matters submitted to it even after a hearing has been held and a decision rendered. In Michigan Consolidated Gas Co. v. Federal Power Commission, 108 U.S. App. D.C. 409, 283 F. 2d 204 (D.C. Cir. 1960), cert. den. 364 U.S. 913, this Court held that the Commission's refusal to consider a settlement proposal, in which only partial abandonment of a gas supplier's service was suggested, after the Commission had ordered total abandonment on the basis of a hearing record, was a reversible error. In a petition for rehearing of that case, the Federal Power Commission complained that it was "sheer

madness to say that one of the contending companies could lie back with an alternative proposal until after the clock has struck, and then, wholly without warrant in the governing statutes or rules, ambush the Commission and force it to enter into another, new comparative hearing." The Court, however, rejected the Commission's assertions and held that the settlement proposal was a matter which on its face reflected an alternative "so apparently in the public interest" that its consideration was "indispensable to the validity of any public interest determination in support of total abandonment." 108 U.S. App. D.C. at 431, 283 F.2d at 225.

The Commission's selective treatment of facts setting forth public interest matters, its failure to take into account other public interest questions, such as the Ashbacker and § 307(b) questions, its obstinate reliance on narrow technicalities (which, as shown above, do not even furnish a valid excuse for defending the grant), lead ineluctably to the conclusion that, true to its historic antipathy to economic injury cases, the Commission has assumed a blind defense of its grant rather than the public interest as its primary role in the proceedings. Cf. Clarksburg Pub. Co. v. Federal Communications Commission, supra.

The focal issue in this case is whether the Yuma-El Centro area can support a new television station without destructive economic injury inimical to the public interest. The record in this case strongly indicates that it cannot. The Commission's orders fail to rule on that question; whatever rulings it made were not based on all of the available evidence and did not dispose of all the public interest questions presented. Its findings are selective, incomplete and contradictory and do not support the conclusion reached. The case should be reversed and remanded.

CONCLUSION

For the foregoing reasons, the case should be reversed and remanded, the operating authority issued to intervenor and the Commission's orders should be vacated and suspended, pending further proceedings consistent with the Court's opinion.

Respectfully submitted,

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APPENDIX

Communications Act of 1934, as amended, 47 U.S.C.

Allocations of Facilities; Term of Licenses

Section 307.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Applications for Licenses; Conditions in License
for Foreign Communication

Section 308.

(a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: Provided, That (1) in cases of emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or security or otherwise in furtherance of the war effort, or (3) in cases of emergency where the Commission finds, in the nonbroadcast services, that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, during the emergency so found by the Commission or during the continuance of any such national emergency or war, in such manner and upon such terms and conditions as the Commission shall by regulation prescribe, and without the filing of a formal

application, but no authorization so granted shall continue in effect beyond the period of the emergency or war requiring it: Provided further, That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

Action Upon Applications; Form of and Conditions Attached to Licenses

Section 309.

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) Except as provided in subsection (c) of this section, no such application —

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services, or

(2) for an instrument of authorization in the case of a station in any of the following categories:

(A) fixed point-to-point microwave stations (exclusive of control and relay stations used as integral parts of mobile radio systems),

(B) industrial radio positioning stations for which frequencies are assigned on an exclusive basis,

(C) aeronautical en route stations,

(D) aeronautical advisory stations,

(E) airdrome control stations,

(F) aeronautical fixed stations, and

(G) such other stations or classes of stations, not in the broadcasting or common carrier services, as the Commission shall by rule prescribe,

shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

(c) Subsection (b) of this section shall not apply —

(1) to any minor amendment of an application to which such subsection is applicable, or

(2) to any application for —

(A) a minor change in the facilities of an authorized station,

(B) consent to an involuntary assignment or transfer under section 310(b) or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control,

(C) a license under section 319(c) or, pending application

for or grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license,

(D) extension of time to complete construction of authorized facilities,

(E) an authorization of facilities for remote pickups, studio links and similar facilities for use in the operation of a broadcast station,

(F) authorizations pursuant to section 325(b) where the programs to be transmitted are special events not of a continuing nature,

(G) a special temporary authorization for nonbroadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or pending the filing of an application for such regular operation, or

(H) an authorization under any of the proviso clauses of section 308(a).

(d) (1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent

with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e).

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the

applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

Limitation on Holding and Transfer of Licenses

Section 310.

(b) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

Construction Permits

Section 319.

(c) Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit. The provisions of section 309 (a), (b), (c), (d), (e), (f), and (g) shall not apply with respect

any station license the issuance of which is provided for and governed by the provisions of this subsection.

Rehearings

Section 405. After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 5(d)(1), any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 5(d)(1), in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. A petition for rehearing must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Rehearings shall be governed

by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. The time within which a petition for review must be filed in a proceeding to which section 402(a) applies, or within which an appeal must be taken under section 402(b) in any case, shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed with the Commission in such proceeding or case, but any order, decision, report, or action made or taken after such rehearing reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order.

Public Law 391 - 84th Congress

Chapter 1 - 2d Session

H. R. 5614

AN ACT

To amend the Communications Act of 1934 in regard to protests of grants of instruments of authorization without hearing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (c) of section 309 of the Communications Act of 1934, as amended, is amended to read as follows:

"(c) When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) hereof, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall be served

on the grantee, shall contain such allegations of fact as will show the protestant to be a party in interest, and shall specify with particularity the facts relied upon by the protestant as showing that the grant was improperly made or would otherwise not be in the public interest. The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant, except with respect to such matters as to which the Commission, after affording protestant an opportunity for oral argument, finds, for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented. The Commission may in such decision redraft the issues urged by the protestant in accordance with the facts or substantive matters alleged in the protest, and may also specify in such decision that the application be set for hearing upon such further issues as it may prescribe, as well as whether it is adopting as its own any of the issues resulting from the matters specified in the protest. In any hearing subsequently held upon such application issues specified by the Commission upon its own initiative or adopted by it shall be tried in the same manner provided in subsection (b) hereof, but with respect to issues resulting from facts set forth in the protest and not adopted or specified by the Commission, on its own motion, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the protestant. The hearing and determination of cases arising under this subsection shall be expedited by the Commission and pending hearing and decision the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance or conduct of an existing service, or unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect, in which event the Commission shall authorize the applicant to utilize

the facilities or authorization in question pending the Commission's decision after hearing."

Approved January 20, 1956.

**FEDERAL COMMUNICATIONS COMMISSION
RULES AND REGULATIONS**

§1.106 Petition for reconsideration of final action taken by the Commission en banc or by a designated authority pursuant to a delegation.

(c) A petition for reconsideration which relies on facts which have not previously been presented to the Commission or to the designated authority, as the case may be, will be granted only under the following circumstances:

(1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters;

(2) The facts relied on were unknown to petitioner until after his last opportunity to present such matters, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or

(3) The Commission or the designated authority determines that consideration of the facts relied on is required in the public interest.

§1.108 Reconsideration on Commission's own motion.

The Commission may, on its own motion, set aside any action made or taken by it within 30 days after release of the document containing the full text of such action or, in case such a document is not released, after release of a "Public Notice" announcing the action in question.

**§1.580 Local notice of filing; public notice
of acceptance for filing; petitions to deny**

(i) Any party in interest may file with the Commission a petition to deny any such application (whether as originally filed or amended) no later than 30 days after issuance of a public notice of the acceptance for filing of any such application or amendment thereto: Provided, however, That in the case of applications for standard broadcast facilities, petitions to deny may be filed at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; but where the Commission issues a public notice pursuant to the provisions of §1.571(c) listing standard broadcast applications as available and ready for processing, no petitions to deny any such listed application will be accepted after the "cut off" date specified in the public notice: And provided further, That in the case of applications for renewal of license, petitions to deny may be filed at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing. Petitions to deny shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with the public interest, convenience, and necessity. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-207

VALLEY TELECASTING CO., INC.

Appellant

FEDERAL COMMUNICATIONS COMMISSION

Respondent

DESERT TELECASTING COMPANY, INC.

Respondent

On appeal from the decision of the
Federal Communications Commission

PAULA A. PORTER

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VALLEY TELECASTING CO., INC.



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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,267

VALLEY TELECASTING CO., INC.,

v.

FEDERAL COMMUNICATIONS COMMISSION,

DESERT TELECASTING COMPANY, INC.,

Appellant,

Appellee,

Intervenor.

On Appeal From Decisions of the
Federal Communications Commission

REPLY BRIEF FOR APPELLANT

The central issue in this case is whether or not the Yuma - El Centro area, which is served by appellant's station KIVA-TV, can support an additional television station. If, as appellant contends, it cannot, the establishment of intervenor's new station in Yuma will cause a degradation and ultimate destruction of service to the public in that area.

In making and reaffirming its consent to the assignment of a permit to build a new station in Yuma, from a permittee who would not build the station to another who already has, and in granting additional permits to construct new stations in El Centro, the Commission did not hold, nor does it here contend, that the area can, in fact, support three additional stations. Instead, the Commission held that

appellant had raised the public interest question too late and by insufficient allegations.

Appellant contends that its pleadings were both timely and sufficient under the Communications Act. Appellant further contends that, even if they were not, these objections do not excuse the Commission from making grants only when they are in the public interest. The decision in this case shows that the Commission failed to consider all of the public interest considerations involved in the subject assignment of a construction permit.

I. Timeliness

Appellant contended before the Commission that, since the establishment of a new television station in the Yuma - El Centro area would cause destructive economic competition inimical to the public interest, the permit to construct a new station in Yuma should not be assigned from one who would not build the station to one who would. The Commission denied the petition on grounds that, since appellant's premise of economic injury implicitly raises questions as to the wisdom of the original grant of permit and since the time for attacking that grant had expired, appellant's petition was untimely. Thus, in that context, the issue is whether a petition to deny directed against the assignment application may be premised on economic injury, even though that premise could have been raised in earlier proceedings.

In its reply brief, appellee attempts to support its contention first with a general argument (not based on the question of assignments or on Section 310(b) of the Communications Act which deals with assignments), to the effect that once the opportunity has passed to raise on economic, or other issue, the question is forever moot. However, its reliance on the cases cited in its brief appears to be misplaced.

In Coastal Bend Television Co. v. Federal Communications Com-

mission, 98 U.S. App. D.C. 251, 234 F.2d 868 (D.C. Cir. 1956), the Court reviewed the Commission's denial of petitions requesting that it defer the grant of television permits for channels assigned after a lengthy channel allocation hearing (the same one which assigned Channel 13 to Yuma) until a new pilot rule making proceeding, affecting selected markets, would either affirm or deny the wisdom of the original channel assignments. The pending rule making proceeding was probing the advisability of "intermixing" VHF and UHF channels in the same market and the "deintermixture" of already "intermixed" markets. The parties complaining of the adverse effects of the previous proceeding, and hoping for relief from the pending one, had a full opportunity to present their claims in these separate rule making proceedings. Since the Commission here is careful not to make the specious argument that appellant herein should have exhausted its remedies in the proceeding held in 1950-1952, which, originally assigned Channel 13 to Yuma (appellant was not in existence then), and itself distinguishes Coastal Bend from the instant situation, no prolonged argument is required to show its inapplicability to the subject assignment.

Gerico Investment Co. v. Federal Communications Commission, 103 U.S. App. D.C. 141, 255 F.2d 893, on which case the Commission further relies, stands for the proposition that new economic competition does not modify an existing station's license within the meaning of Section 316 of the Act (as new electrical interference would), and that, therefore, the hearing required under that section of the Act was not within the protestant's right. Appellant, of course, does not claim that its license was modified; it relies on the hearing rights guaranteed under Section 309 (d) (1) of the Act which is applicable to the assignment application in question filed under Section 310 (b). In fact, dictum in Gerico seems to negate the proposition for which it is here cited. The Court in that case stated:¹

¹ 103 U.S. App. D.C. at 143, 255 F.2d at 895.

We assume that the economic factors relied upon by Gerico were proper to be considered by the Commission, if then brought to its attention, when it decided that a Channel 10 operation should be authorized at Miami, cf. *Greylock Broadcasting Co. v. United States*, 97 U.S. App. D.C. 414, 231 F.2d 748, as well as when it initially allocated the channel to Miami. They would also give standing to Gerico as a party in interest to participate in proceedings with respect to the authorization of operation, and as a person aggrieved under the judicial review provisions of the statute. (Emphasis supplied.)

Radio Station WOW v. Federal Communications Commission, 87 U.S. App. D.C. 226, 184 F.2d 257, carries the above reasoning further and declares that, even after the establishment of the new station, facts which could have, but were not presented by a party in interest at the time the original application was made, may still be good grounds for protesting a subsequent application for renewal of license. Yet, the Commission erroneously relies on this case to prove that once the opportunity passed for raising a valid issue in connection with a previous application, the issue is forever moot.

In Mass Communicators v. Federal Communications Commission, 105 U.S. App. D.C. 277, 266 F.2d 681, a new applicant filed for a frequency for which a former permittee's permit had expired. It was held there that the Commission's reinstatement of the expired permit nunc pro tunc was a proper exercise of its discretion and, therefore, the reinstated permittee's frequency was not available for mutually exclusive applications so as to require a hearing under the Ashbacker doctrine. The mandate of Section 310(b) of the Act to treat assignment applications as new applications for that authorization, however, is not phrased in discretionary terms. The Commission has no choice but to treat an assignment application, such as the one in question here, as a new application under Section 308 of the Act. Economic injury issues can properly be raised

against such new applications; therefore, they can be raised against assignment applications as well.

In support of its specific contention that an assignment application "does not constitute the filing of pleadings against which a petition to deny on the grounds of alleged economic injury may appropriately be lodged" (Br. 24), appellee employs a strained logic which goes counter to the express legislative intent. Section 310(b) of the Act, adopted in 1952, clearly provided that any assignment application shall be disposed of as if the proposed transferee or assignee were making a new application under Section 308 for the permit or license to cover permit. The only exception added was that the Commission, in acting upon an application for approval of assignment, "may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proper transferee or assignee." As H. Report 1750 (82nd Cong., 2nd Sess.) explained this latter proviso:¹

"In other words, in applying the test of public interest, convenience and necessity the Commission must do as though the proposed transferee or assignee were applying for the construction permit or station license and as though no other person were interested in securing such permit or license."

It is true that in the subsequent 1960 amendments to the Act, wherein provision was made for the pre-grant protest procedures now in force, Section 309(b)(2)(B) exempted assignments which do not involve a substantial change in ownership or control from the pre-grant protest provisions. The reason for this exemption is entirely clear. Under the pre-grant procedures, no application subject to petitions to deny under Section 309(d)(1) of the Act could be granted for at least 30 days after their filing. Congress did not want the Commission to defer action on

¹ 1952 U.S. Code and Congressional and Administrative News 2246.

applications of minor concern for 30 days. This thought was expressed by Congress in H. Report No. 1800 (86th Cong., 2nd Sess.) as follows: ¹

"Subsection (c) of section 309, in the committee substitute, listed several specific exceptions to the 30-day waiting period required by subsection (b). These specific exceptions deal with situations where the matters considered are of minor concern and where the 30-day waiting period and the filing of a petition to deny would serve no useful purpose. The remedy afforded by section 405 of the Act would, however, be available in the event the Commission erred."

Thus, it is obvious that, in distinguishing between assignments which involve substantial change in ownership and those which do not, Congress merely intended to speed the administrative process for those of minor concern. The Commission's conclusion that, as a result, assignment applications which involve major change in ownership are not open to the same pre-grant protests to which new applications for the authorization in question are subject would abrogate the plain language of Section 310(b) and read into the Act interpretations contrary to its express language. ²

¹ 1960 U.S. Code and Congressional and Administrative News 3519.

² It is also true, as appellant contends, that under Section 319(c) of the Act an application for a license to cover a construction permit is not open to the same attack as an original application for a construction permit. In fact, Section 309 (c)(2)(C) also exempts such application from the 30-day statutory pre-grant waiting period. Since, under Section 310(b) of the Act, an assignment application is treated as a new application for the authorization in question, some valid argument could, perhaps, be made by one who seeks the assignment of a license, rather than a permit, that he deserves a higher degree of protection. It might be argued that one who has built a station on the force of a valid permit may have a greater stake in obtaining the covering license than a mere applicant for a permit. In any event, the application attacked here was one for the assignment of a permit from a permittee who had not yet built. Therefore, appellee can take no comfort in the fact that a license application is not subject to a petition to deny. Intervenor is in the same position as a new applicant for the permit under Section 308 of the Act.

Nor should the Commission's strained argument based on the statutory distinction between assignments involving substantial and insubstantial changes in ownership be permitted to create the impression that the application here under scrutiny is anything but a major change under the Act.¹ Cf. WJPB, Inc., 19 Pike & Fischer Radio Reg. 1381 (1960).

Intervenor and appellee vigorously urge that the criterion for standing to protest and the criterion for a valid protest are different. But appellant recognized this distinction in its main brief. The point, however, is that if appellant's economic protest directed against the assignment application can be denied on the grounds that an economic protest against an assignment application generally does not lie, then this is tantamount to stating that no economic protest against any assignment application could ever prevail. If this were true, there would be no reason for affording standing to economic protestants under Section 310(b) of the Act. The Commission's quarrel therefore is either with the statutory scheme provided by the Congress or by the Court's interpretation of its logical results in Camden Radio, Inc. v. Federal Communications Commission, 94 U.S. App. D.C. 312, 220 F.2d 191 (D.C. Cir. 1954).

As was detailed in appellant's main brief, the Commission now limits the holding of the Camden case by requiring a causal connection between the reasons for the protest and the nature of the application protested. And, there may be some logical support for the argument that where an existing rival station changes hands, the protesting station should show how its economic injury would be enhanced by such a change. However, where, as here, the assignment concerns an empty permit, and where the Commission, for purposes of standing, admits the increased

¹ Section 1.540 of the Commission's Rules and Regulations provides for the filing of assignment applications on an FCC Form 314, transfer applications on an FCC Form 315 and applications involving minor modifications by transfer or assignment on an FCC Form 316 (Short Form). The KBLU-TV assignment application could not have been, and was not filed, on the short form.

economic danger to protestant, even this limited interpretation of Camden requires a hearing. In the instant case the Commission grudgingly acknowledged an economic protestant's standing, but declared that such protestant could, under no circumstances, ever prevail on the merits of his economic protest directed against an assignment. The Commission should be permitted to cure this error on remand.

II. Sufficiency

A. The Carroll Case

In Carroll Broadcasting Company v. Federal Communications Commission, 103 U.S. App. D.C. 346, 349-350, 258 F.2d 440, 443-444, this Court held that "when an existing licensee offers to prove that the economic effect of another station would be detrimental to the public interest, the Commission should afford an opportunity for presentation of such proof" and remanded the case for further findings even though protestant "did not cast its offer of proof exactly in terms of the public interest."

When appellee comments on the proper interpretation of the Carroll case in its brief (p. 32), it overlooks the fact that appellant urged that case as an a fortiori argument to prove that its pleadings alleged a prima facie Carroll case. The Court in Carroll held that a protestant who accepts the burden of proof in an economic injury case, and who meets this burden in the hearing, merits the findings of the Commission on the economic point. Protestant in that case had already had a hearing; only the findings were missing. And the Commission now urges that it be permitted to escape its Carroll obligation to make appropriate findings in this case on grounds that, contrary to the basic assumption of the Court in Carroll, the Commission did not even afford an opportunity to protestant to prove his case. The Carroll case assumed a hearing as a matter of course and held that, by fulfilling the minimum obligation of affording a hearing, the Commission had nevertheless not fulfilled all of its obligations until it had made findings on the economic issue.

B. The Barnes Report

Appellant's independent expert economic consultant, Dr. Irston R. Barnes, after an impressive study of the market, concluded that the Yuma - El Centro area would not be able to support another television station for five to ten years and that the establishment of a new station would drive KIVA off the air within the first year of the new station's operation. The Barnes Report consists of six parts. Intervenor refers to only two pages of one of four subparts to Part V, which is "A Comparison of KIVA's Operations and Markets With the Industry's Experience." This part explains, in subpart 1, why it is valuable, *inter alia*, to (1) conduct a comparative analysis of television markets, (2) consider the application of industry yardsticks to KIVA's revenue and expense experience, and (3) examine KIVA's advertising experience. Subparts 2, 3 and 4 of Part V are then devoted to these three analyses. Intervenor, in its brief (p. 5), selected two pages of subpart 3 in an attempt to show that the Yuma market has some untapped resources, contrary to Dr. Barnes' opposite conclusions.¹ This transparent method of selecting isolated statements, out of context, from a 147 page report in an attempt to refute the entire report, must fail.

An attempt to answer every out-of-context use by intervenor of the Barnes Report would be superfluous. Appellant believes that the honest reporting of all favorable and unfavorable economic facts demonstrates the impartiality and reliability of the Barnes Report. Economic expertise enters in making the correct judgment on the final analysis of all the supporting and countervailing factors.

The Barnes Report does not state, nor has appellant ever contended, that there are no prospects of ever being able to establish a new television station in the Yuma - El Centro area without public injury. Dr. Barnes faithfully and objectively reported those favorable economic facts which, despite the present overwhelmingly unfavorable facts, show that the area will be able to support one more television station some

¹ Dr. Barnes' other analyses showed that KIVA has operated efficiently and "has diligently exploited the revenue possibilities of its market." Its inability to do better was considered an adverse reflection on the market possibilities.

time after the expiration of the next five to ten years. If one deletes all the unfavorable economic factors, as appellee and intervenor would do in their briefs, and considers only favorable factors, there may well be sufficient material left in the Barnes Report to support an argument for the establishment of a new station even before the expiration of the five-to-ten year period. Such deletion, however, cannot successfully impeach the accuracy of the entire Report. Intervenor cannot validly segregate the bitter from the sweet.

It is noteworthy that even by censoring 145 pages out of the 147-page report, the out-of-context use of the Barnes Report by intervenor can, at best, result in a weak argument in favor of one additional station without KIVA's demise. Such argument would still not support the addition of the three new stations which the Commission has now approved — intervenor's in Yuma and the two new permittee's in El Centro. Nor would this argument explain why the Yuma applicant, rather than one of the two El Centro applicants, should be favored in such eventuality.

The income figures supplied by appellant in its petition to deny were based on the report of appellant's accountants for the fiscal years ending March 31, 1961 and 1962. The profit figures for 1961, as reported in the Barnes Study, were taken from appellant's final financial report to the Commission which covers the calendar, rather than the fiscal, year. The Barnes Study indicated profits for the fiscal year ended March, 1963, the latest figures then available. Therefore, the alleged inconsistency in KIVA's income figures stems from the fact that the Barnes Analysis presented the economic picture in a light most favorable for additional competition and was predicated upon periods different from those referred to in the petition to deny.¹

¹ As was shown in appellant's reply to oppositions to its motion for stay filed in this Court, appellant's most recent financial statement indicated that during the first eight months of the then current fiscal year (through November 30, 1963) appellant had suffered a loss of \$45,711 (page 21). Appellant had experienced a decrease of about \$5,000 in monthly network revenues as a result of

[footnote continued on next page]

C. CATV

Intervenor urges that the subscribers to a community antenna television system in Yuma, who have access to many programs broadcast in other markets, should be considered new and untapped sources for the support of a new local station. While there is no evidence that this thought entered the Commission's decision, it is of some significance that the number of the Yuma CATV subscribers as of December 7, 1963, was only 1,864. It requires no elaborate argument to show that this number is too small to support a new station or materially to change the television outlook in Yuma.

Moreover, it seems unlikely that even this small number of subscribers would abandon its CATV service of four or more television channels merely because a second station has been established in Yuma. The monthly fee collected from CATV subscribers may justify the existence of the CATV service. Yet, the addition of 1,864 viewers to the television market would neither justify an increase in advertising rates by a television station nor would it make the market more attractive for national and regional advertisers.¹

[continued from previous page]

its loss of ABC and CBS network affiliations (page 25). Thus, evidence subsequent to the establishment of a second television station in Yuma substantially followed the predictions of the Barnes analysis.

¹ In this connection, it should be pointed out that appellant's ownership of the local CATV system is not a valid reason for requiring appellant to operate a failing local television station. Appellant's CATV operations do not depend on its broadcast operations nor can appellant be expected to subsidize its broadcast operations with CATV revenues. In fact, appellant's acquisition of the financially failing television station, KIVA., was permitted by the Commission, despite appellant's ownership of a CATV system, because it was thought at the time to be the only method for keeping station KIVA on the air. In any event, it is hardly reasonable to expect appellant to sustain further severe losses or total destruction in its broadcast operations during the next five to ten years (in case only one additional station is permitted in Yuma) or ad infinitum (in case two or three additional stations are permitted in Yuma), simply because it also operates another business which is not failing.

D. Selective Treatment

Even if the Commission had based its conclusions on the arguments now advanced by the Commission's counsel, its decision would be erroneous. As this Court stated in Easton Publishing Co. v. Federal Communications Commission, 85 U.S. App. D.C. 33, 175 F.2d 344, 349: "The court looks at the conclusion found by the Commission . . . to see that it falls within the perimeter of reason drawn by the findings; and at the findings to see that they have support of substance in the evidence." However, in this case the Commission failed to make findings, and had it made findings as suggested by counsel, its conclusions drawn in this case would not "fall within the perimeter of reason." Moreover, as was stated in Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 94:

The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such responsible finding.

The Commission, however, made no findings on the Barnes Report, other than the one-sentence statement that it is not compelling, and Commission counsel's selective findings from the Barnes Report are insufficient to challenge the sufficiency of appellant's prima facie case. See Hudson Valley Broadcasting Corporation v. Federal Communications Commission, __ U.S. App. D.C. __, 320 F.2d 723, 727.

III. Public Interest

Appellee's and intervenor's briefs fail specifically to address themselves to the third issue which all parties agreed is raised by this appeal. This issue, to which pages 32-39 of appellant's main brief were devoted, reads as follows:

Irrespective of the sufficiency of appellant's pleadings, did the Commission err in failing to institute its own inquiry or in failing to reconsider its decision, on its own motion, in light of the evidence before it and available to it concerning the likelihood of economic injury inimical to the public interest which would result from the consent to the application for the assignment to intervenor of the permit to construct a new station in Yuma, Arizona?

Insofar as the appellee's and intervenor's attempts to impeach the Barnes Report may be considered as responsive to this issue, these attempts have been answered, supra.

Appellant, of course, does not abandon its argument directed to the above public interest point and urges, as it has in its main brief, that the answer to that issue furnishes a compelling reason for reversing the Commission's decision.

Respectfully submitted,

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255
IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

VALLEY TELECASTING CO., INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

DESERT TELECASTING CO., INC.,
Intervenor.

FILED JAN 20 1964

Case No. 18,267

Nathan J. Paulson
CLERK

OPPOSITION OF THE FEDERAL COMMUNICATIONS COMMISSION
TO PETITION FOR REHEARING OR RECONSIDERATION EN BANC

The Federal Communications Commission, appellee herein, opposes the Petition for Rehearing or Reconsideration en banc filed by appellant, Valley Telecasting Co., Inc. (Valley), of its Motion for Stay in the above-captioned case, which this Court denied on December 26, 1963.

The petition for rehearing en banc is grounded upon the claim that the denial of a stay here conflicts with this Court's grant of a stay on October 29, 1963 in KGMO Radio Television, Inc. v. Federal Communications Commission, Case No. 18,064. However, Valley has failed to show any such conflict of approach as would warrant an en banc consideration of its request for interlocutory relief.

The complete statement of the facts of this case has been set forth in "Appellee's Opposition To Motion For Stay", pp. 2-8, which was filed on December 17, 1963. Valley is the licensee of television station KIVA, up until now the only television station in Yuma, Arizona. It opposed before the Commission the assignment of the license of television station KBLU-TV, and a requested extension of time to

construct station KBLU-TV. The primary contention of Valley was that Yuma could not support two television stations and that the establishment of a second station would force KIVA-TV off the air, thereby causing a net loss of service to the public. The Commission rejected Valley's position, largely on the ground that the proper time to raise this issue was when the original grant of a construction permit had been made for station KBLU-TV. Valley had made no objection to the original authorization for KBLU-TV.^{1/} The Commission also stated that Valley had not presented matter so compelling as to warrant action on the Commission's own motion.

In the KGMO case, the Commission denied a petition for reconsideration of the grant of a construction permit for a new standard broadcast (AM) station in Cape Girardeau, Missouri. The objection made there, by one of two existing stations in Cape Girardeau, was alleged inability of the community to support a third station. Although no pre-grant petition to deny had been filed, the Commission did not decide whether this precluded consideration of the petition for reconsideration since, in its view, the petition did not allege facts sufficient to raise an issue of economic injury leading to public harm.

^{1/} While Valley had filed a petition to deny the application of another party for the same channel, it had withdrawn this opposition when the KBLU-TV application was filed, and had never filed an opposition to the grant to KBLU-TV. This was so despite the fact that the competing application was withdrawn, and the KBLU-TV application was not granted until almost two months later.

While the two cases are similar in that both involve contentions of competitive economic injury,^{2/} Valley has failed to show that the two panels of this Court applied different criteria to the two requests for stays, or otherwise acted inconsistently in a manner warranting a hearing en banc. First of all, requests for interlocutory stays uniquely turn upon the particular showings made of irreparable injury. We contended in this case, with apparent success, that the economic study submitted by Valley itself showed that its operation would not be degraded by the advent of KBLU-TV, let alone destroyed. This was so because, although KBLU-TV might cut into Valley's advertising revenues, the start of a new station would generate new revenues, and increase total television revenues, of which Valley's share would provide it an ample profit. Surely, the circumstance that the Court believed there would be irreparable injury in one case, and not in a different case involving different services, different communities, and different factual showings, does not suggest a need for en banc reconsideration.

Furthermore, the service of KBLU-TV in Yuma would provide the first local competitive television service in that community. Cape Girardeau, where the Court stayed the advent of a new AM service, already has two AM stations. This is certainly a relevant difference.

^{2/} See Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F.2d 440.

Finally, the cases present differing issues on the merits. In KGMO the Commission held essentially that no substantial issue warranting a hearing had been raised by the factual allegations before it. It was ruling on a petition for reconsideration of a new grant. In the present case, the Commission was dealing with claims which had not been raised when the grant had originally been made, and it based its decision almost entirely upon the ground of untimeliness, without regard to the question of whether the grounds alleged would have been sufficient to warrant a hearing if raised at the proper time.

It is thus clear that the two stay motions each presented their special issues for decision. The mere fact that KGMO convinced the Court and Valley did not, which is all that Valley can show, will not support its present motion. The reiterated claim of irreparable injury, already heard and unanimously rejected by the Court, does not, we believe, require further comment.

Respectfully submitted,

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January 20, 1964.

CERTIFICATE OF SERVICE

I, Daniel R. Ohlbaum, hereby certify that on this 20th day of January, 1964, I mailed true copies of the foregoing Opposition to the following:

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STATEMENT OF QUESTIONS PRESENTED

Counsel for the parties entered into a prehearing stipulation approved by Order of the Court dated January 23, 1964. The questions presented by this appeal are as follows:

1. Did the Commission err in holding that appellant's pleadings directed against the application for assignment of the permit to construct a new TV station in Yuma, Arizona (KBLU-TV), were either untimely or insufficient to establish the necessity of a hearing on the question of economic injury inimical to the public interest?
2. Did the Commission arbitrarily, capriciously and contrary to law, prior precedents and policies, establish new standards for pleading a prima facie case sufficient to require a hearing on the issue of economic injury inimical to the public interest?
3. Irrespective of the sufficiency of appellant's pleadings, did the Commission err in failing to institute its own inquiry or in failing to reconsider its decision, on its own motion, in light of the evidence before it and available to it concerning the likelihood of economic injury inimical to the public interest which would result from the consent to the application for the assignment to intervenor of the permit to construct a new station in Yuma, Arizona?

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,267

VALLEY TELECASTING CO., INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

DESERT TELECASTING COMPANY, INC.,

Intervenor.

ON APPEAL FROM DECISIONS OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant's Statement of the Case is somewhat incomplete. It is believed that a full counterstatement of the proceedings would be of assistance to the Court.

This appeal, brought under Section 402(b)(6) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b)(6), is from three orders of the Federal Communications Commission: the first, released on August 9, 1963 (R. 62-68), denied the appellant's petitions (a) to deny applications of Desert Broadcasting Company and of Desert Telecasting Company to assign a permit to construct a new television

station (KBLU-TV) and a license for an existing standard broadcast station, both in Yuma, Arizona, to Desert Telecasting Company, Inc., and (b) to deny an application of Desert Telecasting Company for an extension of time in which to construct station KBLU-TV;^{1/} the second, released on December 9, 1963 (R.387-391), denied appellant's petition for reconsideration of the August 9, 1963 order and its motion for stay of construction; and the third, released on December 2, 1963, granted program test authority to Desert Telecasting Company, Inc., to operate station KBLU-TV in Yuma, Arizona.

The background of this case is as follows:

Appellant, Valley Telecasting Co., Inc. (Valley), is the licensee of television station KIVA-TV, operating on Channel 11 at Yuma, Arizona. Prior to the events upon which this appeal is based, KIVA-TV was the only television station in Yuma. On October 31, 1961, New England Industries, Incorporated (New England), filed an application for a new television station at Yuma, to operate on Channel 13. A competing application for Channel 13 was filed on November 30, 1961, by Robert Hardy Langill and Robert Crites, a partnership d/b as Desert Telecasting Company (Desert). On December 5, 1961, Valley submitted a petition to deny New England's application (R. 718-733) under Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. 309(d)(1). Valley contended that the establishment of a

^{1/} The Commission also dismissed as moot appellant's motion of May 9, 1963 to designate for a consolidated hearing the aforementioned applications with applications filed by KXO-TV, Inc., and Tele-Broadcasters of California, Inc., for construction permits for new television stations in El Centro, California (R. 62).

second television station in Yuma would cause economic injury to KIVA-TV so severe as to result in the latter's demise, and that since KIVA's service area was larger than that proposed by New England, there would be a net loss of service to the public if KIVA were forced to close (R. 718-722). Valley asked that the New England application be designated for hearing on an economic injury issue pursuant to Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F.2d 440.

New England filed its reply to Valley's petition on January 8, 1962 (R. 734-738) and, after asserting that Valley had failed to establish a prima facie case as required under Section 309(d)(1) of the Communications Act (R. 734-735), requested that if the Commission found that an inquiry should be held on Valley's petition, then the Commission should call up the renewal application of Valley's station KIVA-TV to determine "which applicant would better serve the public interest" (R. 736-737).

On January 30, 1962, Valley withdrew its petition to deny (R. 739-741), stating that the comparative hearing which it expected would be held between New England and Desert would be of extended duration, and that it was difficult to foretell whether or not the economic circumstances obtaining at the close of the hearing would be the same as those described in Valley's petition (R. 740). New England withdrew its application for Channel 13 on May 31, 1962, leaving Desert as the sole remaining applicant, and eliminating the need for a comparative hearing. Valley did not file any pre-grant

objection against Desert's application, and on July 23, 1962 the Commission granted such application. No petition for reconsideration of this action was filed by Valley. The new Yuma station was assigned the call letters KBLU-TV.

On March 8, 1963, the Commission accepted for filing an application (R. 76-102) for Commission consent to the assignment of the license of KBLU-TV from Desert, as a partnership, to a new corporation, Desert Telecasting Company, Inc. (Desert Incorporated). One-half of the stock of Desert Incorporated was owned by Mr. and Mrs. Robert Crites, and one-half was owned by Mr. and Mrs. Louis Noga of Beverly Hills, California. Concurrently, an application was filed for approval of the assignment of standard broadcast (AM) station KBLU, formerly owned by Robert Crites individually, to Desert Incorporated.

The effect of the proposed assignment of the license of KBLU-TV would be to continue the participation of Robert Crites in the ownership of the station, and to eliminate Robert Hardy Langill, an original partner of Desert, replacing his interest with the new 50% corporate interest of Mr. and Mrs. Louis Noga. Langill informed the Commission by affidavit dated April 16, 1963 (R. 132), that although he had at his disposal adequate funds to insure his portion of the financial needs of the television station, he realized after the construction permit was granted that he was not "emotionally prepared" for the burdens of management responsibility, and he then informed Crites of his desire to withdraw from the venture, stating that he was agreeable to his replacement by other

investors. Langill agreed to assign his interest in station KBLU-TV for \$860.00, a sum equal to the actual expenditures advanced by him for his interest in the station's construction permit (R. 80).

Desert also applied for additional time to construct KBLU-TV (R. 1-3), stating that construction would proceed promptly upon grant of the assignment application.

On April 8, 1963, Valley filed a petition under Section 309(d)(1) of the Communications Act of 1934 to deny the two assignment applications (R. 109-122), and a second petition to deny Desert's application for extension of time to construct KBLU-TV (R. 4-7). Valley's primary contention in each of these petitions was that Yuma could not support two television stations and that the establishment of a second station would force KIVA-TV off the air, causing a net loss of service to the public.

Valley alleged in support of its contention that KIVA-TV offered service to Yuma County in Arizona, Imperial County in California, and portions of San Diego and Riverside Counties in California, and that apart from a Mexican television station and certain fringe service from San Diego and Los Angeles, KIVA-TV was the only television station serving the cities of Yuma, Arizona, and El Centro, California, and the greater portions of Yuma County, Arizona, and Imperial County, California (R. 113).

Valley asserted that KIVA-TV had been a perennial loss operation from the time it began broadcasting in 1953 until 1960, and that the original licensee had been forced into bankruptcy in

1957 (R. 113). Valley stated that its profits before taxes were \$5,300 in 1960, \$3,642 in 1961, and \$15,140 in 1962 (R. 114), and alleged that if Desert were able to obtain a significant portion of the \$90,000 in revenues which Desert anticipated for its first year of operating KBLU-TV, sufficient income would be diverted from KIVA-TV to reduce that station to a loss operation, and ultimately to drive KIVA-TV off the air (R. 115). Valley further contended that KBLU-TV, being limited to a service area smaller than KIVA-TV, would not be able to obtain revenues sufficient to support a viable operation, and would eventually be forced to close down, thereby depriving Yuma of all television service (R. 116). In addition, Valley asserted that a question had arisen as to Desert's character qualifications by reason of Langill's decision to drop out of the proposed venture, and that other questions involving possible "trafficking" and undisclosed financing appeared to be present in the proposed assignment to Desert Incorporated (R. 117-120).

On April 22, 1963, Desert filed an opposition to Valley's petitions to deny (R. 8-26), asserting that Valley's allegations of potential economic injury were improperly raised at this status of the proceeding, and that, in any event, these allegations were without substance. Desert pointed out that Yuma was an area of rapid economic expansion, that the population of Yuma County, according to the United States Census, had increased from 28,006 in 1950 to 46,235 in 1960, and was currently estimated at 51,000 in 1963 (R. 11); and that retail sales for Yuma County, as reported by the Arizona State Tax Commission, had increased from \$66,976,208

in 1958 to \$79,100,842 in 1962 (R. 11). Desert stated that its estimate for \$90,000 in advertising revenues for the first year of KBLU-TV's operations was reasonable, and was based on Crites' experience in operating standard broadcast (AM) radio station KBLU in Yuma, which on a daytime-only basis had grossed \$79,000 per year (R. 11). Desert denied Valley's charges that questions of bad faith as to construction plans, "trafficking" and undisclosed financing were involved in the proposed assignment from Desert to Desert Incorporated (R. 12-15).

On May 9, 1963, Valley filed a motion (R. 30-42) to designate for consolidate hearing the above-mentioned applications of Desert with the applications approved on April 10, 1963 of KXO-TV, Inc., and of Tele-Broadcasters of California, Inc., for construction permits for new television stations on Channels 7 and 9, respectively, at El Centro, California.^{2/} Valley asserted that each one of these proposed new stations raised the question of competitive economic injury to KIVA-TV because the communities of Yuma, Arizona, and El Centro, California, although fifty miles apart, constituted one

^{2/} Tele-Broadcasters, Inc., filed an application to construct a new television broadcast station at El Centro, California, on July 5, 1962. KXO-TV filed its application for a new television broadcast station at El Centro on September 12, 1962. No objection to either application was timely filed, and after examination of the applications the Commission granted them without hearing on April 10, 1963. On May 9, 1963, Valley filed petitions for reconsideration of these grants. On August 1, 1963, the Commission released a Memorandum Opinion and Order denying Valley's petitions for reconsideration on the ground that Valley's factual allegations were insufficient to raise a public interest question. In re Application of KXO-TV, Inc., El Centro, California, 1 Pike & Fischer, R.R. 2d 125. Valley thereupon filed an appeal with this Court in the case of Valley (cont'd)

economic area for television broadcasting, and this area, according to Valley, could not support more than one television station (R. 30-42).

On August 9, 1963, the Commission released a Memorandum Opinion and Order (R. 62-68) denying the two Valley petitions and granting the pending Desert assignment and extension applications. The Commission rejected Valley's petition to deny the extension application on the ground that the explicit language of Sections 309(c) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. 309(c) and (d),^{3/} precluded the filing of petitions to deny against applications for extension of time to construct (R. 63). The Commission also rejected Valley's petition to deny the assignment application on the ground that it constituted an untimely attack upon the original grant of the KBLU-TV construction permit (R. 64). The Commission found that Valley had presented no satisfactory explanation for delaying its opposition to the licensing of KBLU-TV until Desert filed its application for assignment (R. 64), and refused to accept Valley's explanation that it had not filed a petition against the original application for the KBLU-TV construction permit or for

2/ (cont'd) Telecasting Co., Inc. v. Federal Communications Commission, Case No. 18,092. Briefs setting forth the factual background of this appeal have been submitted by the parties, and oral argument has been presented before this Court.

3/ Section 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. 309(d), provides in pertinent part that "Any party in interest may file with the Commission a petition to deny any application * * * to which subsection (b) of this section applies * * *". Section 309(c) of the Communications Act of 1934, as amended, 47 U.S.C. 309(c), further provides: "Subsection (b) of this section shall not apply * * * to any application for * * * extension of time to complete construction of authorized facilities * * *".

reconsideration of the grant only because Valley did not believe that Desert, as then constituted, would be financially capable of constructing and operating the proposed station (R. 64).

The Commission stated that Valley's petition presented no new factual material which could not have been presented at the time of the original grant, except for a single recitation that there had been recent grants for new television stations in El Centro, California. The Commission concluded (R. 65):

A mere recitation that construction permits have been granted for new facilities to serve an area, part of which is in the service area of two previously authorized facilities is insufficient to warrant a Carroll hearing on an application for an assignment of one of said previously existing facilities. Normally, the proper time to raise Carroll issues arising from the grant of construction permits for new facilities is at the time of Commission consideration of the application for said construction permits. This Commission has already denied the petitions filed by KIVA to reconsider the grants of the two El Centro construction permits. KXO-TV, Inc., FCC 63-759, released August 1, 1963. In that decision we considered the aforementioned motion to designate the El Centro and Yuma applications for a consolidated hearing, and we determined that petitioner had not made a showing that Yuma and El Centro are in fact one market nor that the Yuma and El Centro stations depended on substantial common sources of revenue or of program material so as to prevent the operation of the stations in the public interest.^{4/}

Although rejecting the Valley petition as untimely, the Commission also examined the substantive contentions and concluded

^{4/} The term "Carroll issue" refers to the question as to whether a new broadcast station will have an adverse economic effect upon an existing station in the same community sufficient to result in an adverse effect upon the public, and is derived from this Court's decision in Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F.2d 440.

that they fell short of making a prima facie showing under Section 309(d) of the Communications Act that a grant of the assignment applications would be inconsistent with the public interest. The Commission noted Valley's admission that population and retail sales were increasing in the Yuma area and that KIVA-TV's profits had also increased in 1962, and stated (R. 65):

* * * Petitioner alleges that Station KIVA operated at a loss prior to 1960, but admits that the station has made a profit in the past three years, with its best year in 1962. It alleges that the operation of KBLU-TV will deprive KIVA of its CBS affiliation, but it admits that the loss of CBS network revenue can be at least partially restored by revenues for other network or non-network programming. It alleges that the estimated gross revenues (\$90,000) for KBLU-TV are unrealistic, but does not give a satisfactory basis for this conclusion in view of the volume of retail sales in the area, and the past gross revenues of the AM station KBLU (\$79,000 in 1962). Petitioner has given no specific information on total advertising revenue potentially available to the Yuma stations, nor has it alleged that any specific advertising revenue would be irreplaceably lost * * * Furthermore, petitioner has made an insufficient showing that any loss of revenue it might sustain will lead to a loss or degradation of program service in the area. Its conclusion that the operation of KBLU-TV would drive KIVA off the air, and that the smaller service area and managerial inexperience of KBLU-TV would ultimately cause that station's financial ruin is highly speculative. * * *

The Commission further found that the questions raised by Valley as to Desert's character qualifications and the propriety of the assignment to Desert Incorporated were not supported by affidavits from persons with personal knowledge of specific facts, and were countered by sworn statements of the applicants (R. 66). The Commission concluded that Valley's showing in this connection was insufficient under the requirements of Section 309(d)(1) of the Communications Act (R. 66).

The assignment of KBLU-TV's permit from Desert to Desert Incorporated was consummated on August 29, 1963 (R. 169).

On September 9, 1963, Valley filed a petition seeking reconsideration of the Commission's actions of August 9, 1963 (R. 176-364).^{5/} Valley contended that the allegations in its petitions to deny had been sufficient to justify a hearing (R. 177-181), that an expert economic analysis of the Yuma and El Centro areas, prepared by Dr. Irston R. Barnes, a private economic consultant, submitted for the first time with the petition for reconsideration, established the necessity for a hearing (R. 184-188), that regardless of Valley's rights at this stage of the proceeding, public interest considerations compelled the designation of the KBLU-TV applications for hearing to determine whether the Yuma area could support an additional station (R. 191-195), and that the Commission's grant of the applications was in violation of its own policy and rules with regard to "trafficking", misrepresentations, and lack of diligence (R. 195-197).

The economic analysis of the Yuma and El Centro areas, prepared by Dr. Barnes (R. 200-354), showed that KIVA-TV had changed from a loss operation in 1958 and 1959 to a profitable operation after 1960 with profits before taxes of \$5,303 in 1960, \$22,594 in

^{5/} On August 30, 1963 and on September 13, 1963, respectively, Valley moved the Commission to stay its orders granting the assignment applications and the extension application (R. 170-175). The stay motion against the assignment application was denied on October 11, 1963 (R. 385-386). The motion against the extension application was dismissed as moot in view of the Commission's denial of Valley's petition for reconsideration on December 9, 1963 (R. 712).

1961, and \$40,625 in 1962 (R. 284, 326).^{6/} In addition to these earnings, KIVA-TV had set aside depreciation reserves in the amounts of \$37,394 in 1960, \$37,737 in 1961, and \$36,568 in 1962 (R. 284, 326). Dr. Barnes estimated that if the Yuma and El Centro areas became a two station market, advertising revenues for two stations would increase from the sum of \$399,538 earned by KIVA-TV for the year ending March 31, 1962 to the sum of \$464,783 (R. 324), but that if a third or fourth station were added to this area, the total revenues would decline to \$419,858 because of lower advertising rates resulting from increased competition (R. 324). Elsewhere in this report, however, Dr. Barnes listed cities with three or more television stations, where communities approximating the Yuma-El Centro area in population and in retail sales volume showed television broadcast revenues in amounts ranging from \$1,200,000 per year to \$2,516,000 per year (R. 262-265).

Dr. Barnes acknowledged that the Yuma area had experienced substantial population and economic growth in the decade between 1950 and 1960, and that the economy of the area would be aided in the fall of 1963 by the opening in Yuma of Arizona Western College with an estimated student body of 400 (R. 236, 245). He cautioned, however, that the large percentage increases from 1950 to 1960 of 65% in Yuma County's population, 58.3% in its civilian labor force, 150.7% in its wholesale trade sales, 87.1% in employment by government bodies, and 202.5% in employment by financial, insurance and realty firms (R.236),

^{6/} These profit figures are significantly larger for 1961 and 1962 than those previously set forth by Valley in its petition to deny (R. 114).

were limited by the relatively small numbers of people involved, and he predicted that the future growth of the area could be expected to be modest due to the restricted amount of water available for irrigation (R. 240-242), unless added impetus to growth was furnished by an influx of new industrial plants or by the development of the area as a popular winter resort (R. 253-257).

On September 23, 1963, Desert Incorporated filed its opposition to Valley's petition for reconsideration (R. 365-372), stating that Dr. Barnes had failed to give consideration to the fact that Valley was serving the Yuma area not only by KIVA-TV, but also by a community antenna television system which was under common ownership with KIVA-TV.

On December 9, 1963, the Commission released a Memorandum Opinion and Order^{7/} in which it denied Valley's petition for reconsideration (R. 387-391). The Commission rejected each of the contentions advanced by Valley, and reaffirmed its view that allegations of injury to the public interest arising from the economic impact of a new station cannot appropriately be raised by a petition to deny a subsequent assignment (R. 389). The Commission further stated that even if a challenge to the assignment applications were to be regarded as timely, the major supporting material underlying the allegations must be submitted in a pre-grant petition to deny and cannot be

^{7/} Commissioner Hyde was absent; Commissioner Ford did not participate; and Commissioner Cox dissented and voted to grant Valley's petition (R. 387).

withheld until a grant has been made and a petition for reconsideration is filed. Finally, the Commission concluded that the material submitted in the petition for reconsideration did not present "matter so compelling as to call for action by the Commission" on its own motion (R. 391).

Desert Incorporated filed its application for a license to cover the construction permit for KBLU-TV on November 27, 1963. Included as part of the license application was a customary request for program test authority. This request was granted on December 2, 1963, and KBLU-TV commenced operation on the same day.

On December 10, 1963, Valley filed this appeal.

SUMMARY OF ARGUMENT

I.

The Commission correctly determined that appellant's petitions to deny Desert's applications on the ground of competitive economic injury were untimely, in that such petitions were in essence directed not so much against Desert's pending applications for assignment and for extension of time to construct station KBLU-TV, as against the Commission's initial award on July 23, 1962 of a construction permit to Desert for a new television station in Yuma.

The Commission's determination is supported by Sections 309(c) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. 309(c) and (d), which explicitly preclude the filing of a petition to deny an application for extension of time and which, by plain implication preclude the filing of a petition to deny an application for assignment on grounds other than those directly related to the assignment.

Although appellant had previously demonstrated that it knew the appropriate procedure to follow in asserting a Carroll issue against the grant of a construction permit for a new television station, it failed to avail itself of this procedure, and offered no valid justification for its delay. The Commission properly held that a petition to deny the assignment application was an inappropriate vehicle for raising questions pertaining solely to the economic impact of the grant to Desert of a construction permit for a new television station in Yuma. See Coastal Bend Television Co. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 234 F.2d

686; see also Gerico Investment Co. v. Federal Communications Commission, 103 U.S. App D.C. 141, 255 F.2d 893; Mass Communicators, Inc. v. Federal Communications Commission, 105 U.S. App. D.C. 277, 266 F.2d 681.

II.

The Commission correctly determined that even had appellant's assertion of a Carroll issue been timely, appellant nevertheless failed to make a prima facie showing warranting a hearing on the issue of competitive economic injury. The record supports the Commission's findings that appellant's allegations, which showed increased growth in the population and economic activity of Yuma, and revealed improved net earnings for appellant's station after 1960, did not support the conclusions drawn, and did not raise any substantial questions of fact concerning the effect of a new television station in Yuma. Further, the record supports the Commission's holding that appellant made an insufficient showing that any loss of revenue it might sustain would necessarily lead to a loss or degradation of program service in the area.

The Commission also correctly exercised its discretion to deny appellant's petition for reconsideration, finding that the allegations contained therein were essentially the same as those set forth in appellant's petitions to deny, and that a new economic analysis proffered by appellant was untimely. Springfield Television Broadcast Co. v. Federal Communications Commission, ____ U.S. App. D.C. ____, ____ F.2d ____ (Case No. 17,957, decided January 9, 1964); Colorado

Radio Corporation v. Federal Communications Commission, 73 App. D.C. 225, 118 F.2d 24. Moreover, apart from the question of the timeliness of the economic analysis, which the Commission judged to be decisive, the Commission found the analysis did not present matter so compelling as to call for action by the Commission on its own motion. In fact, this economic material weakened rather than strengthened appellant's initial showing by disclosing that the profits of appellant's television station for the years 1961 and 1962 were substantially higher than had been previously reported, and by indicating that total television advertising revenues in the Yuma area would be considerably larger if the community had two television stations rather than just one.

Appellant thus plainly failed to establish a case for a hearing on the issue of competitive economic injury, since the law is well settled that even should economic injury to an existing licensee be established, this factor alone is not a ground for denial of a new, competing broadcast application, unless there is resultant harm to the public interest. Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470; Carroll Broadcasting Company v. Federal Communications Commission, 103 U.S. App. D.C. 346, 349, 258 F.2d 440, 443.

Appellant's reliance upon certain language in Carroll Broadcasting Company v. Federal Communications Commission, supra, as authority for its contention that an offer to prove public injury is sufficient to require the holding of a hearing, is misplaced,

since the Carroll case did not concern the question of the sufficiency of allegations.

Finally, appellant's argument that the Commission has suddenly and without notice imposed a higher standard for pleading economic injury issues is without merit. The recent Commission decisions listed by appellant showing instances where hearings were granted on economic injury issues did not involve television stations, but rather were concerned with standard broadcast (AM) radio stations in very small communities (far smaller than Yuma), where the sole existing station was operating, as a rule, at no better than a marginal basis, and where the economic trend in the communities, for the most part, was adverse.

ARGUMENT

I. THE COMMISSION CORRECTLY DETERMINED THAT APPELLANT'S PETITIONS TO DENY DESERT'S APPLICATIONS ON THE GROUND OF COMPETITIVE ECONOMIC INJURY WERE UNTIMELY.

Appellant's petitions to deny Desert's applications for assignment and for extension of time in which to construct station KBLU-TV were based primarily on appellant's assertion that the Yuma area could not support a second television station, and the attendant conclusion that the establishment of a second station would force appellant's station KIVA-TV off the air, causing a net loss of service to the public in the area (R. 112-116).

The Commission correctly construed appellant's petitions as constituting an attack not so much against Desert's pending applications for assignment and time extension, but rather against the Commission's initial award on July 23, 1962 of a construction permit to Desert for a new television station in Yuma (R. 64, 389). Appellant's attack was properly rejected as untimely. As the Commission stated in its Memorandum Opinion and Order of December 9, 1963 (R. 389):

* * * The Carroll issue cannot be appropriately directed to an assignment application when the petitioner alleges public-interest issues which arose from the impact of the original construction permit for the station and not from the assignment application attacked by the petitioner. For similar reasons, petitioner is not entitled to a hearing on an application for extension of time in which to construct based on allegations of injury to the public interest which arose from the impact of the original grant of the construction permit. cf. Mass Communicators, Inc. v. FCC, 266 F.2d 681, 18 Pike & Fischer RR 2098 (1959). * * *

The Commission was manifestly correct in finding that appellant was seeking to object to a grant it had not originally objected to by attempting to make the assignments and requested extension of time the vehicle for raising an issue which was no longer pertinent. First of all, as the Commission pointed out in its Memorandum Opinion and Order of August 9, 1963 (R. 63), the explicit language of Sections 309(c) and (d) of the Communications Act precluded the filing of a petition to deny Desert's application for extension of time to construct. Similarly, other applicable provisions of the Act show that appellant was untimely in its attempts to attack Desert's applications for assignment on grounds relating essentially to the original award of the construction permit and not to the assignment.

The Communications Act of 1934, as amended in 1960, specifically establishes in Section 309(d)^{8/} a procedure which provides that a person who has any objection to the grant of a construction permit for a new broadcast station should file a petition to deny the application prior to the grant rather than after. In construing this section, this Court stated in Springfield Television Broadcast Co. v. Federal Communications Commission, __ U.S. App. D. C. __, __ F.2d

^{8/} Section 309(d)(1) of the Communications Act provides in pertinent part that any party in interest may file with the Commission a petition to deny any application for an instrument of authorization in the case of a station in the broadcast service at any time prior to the day of the Commission grant thereof without hearing or the day of formal designation thereof for hearing, or such shorter period as the Commission may fix by rule. The pertinent provisions of Section 309(d) are set out in the Appendix, infra.

____ (Case No. 17,957, decided January 9, 1964):

Congress, in amending Section 309 of the Act, obviously intended that oppositions to applications to grant construction permits should be filed before the grant, rather than after, as in the prior procedure.

The Act further provides in Section 405, 47 U.S.C. 405,^{9/} that after a Commission order has been made, any person aggrieved or whose interests are adversely affected thereby, may petition the Commission for rehearing, and it shall be lawful for the Commission in its discretion to grant a rehearing if sufficient reason therefor be made to appear. The Section requires that the petition for rehearing be filed within 30 days from the date upon which public notice is given of the order.

The chronology of appellant's conduct in this matter, as recited by the Commission in its Memorandum Opinion and Order of December 9, 1963 (R. 389), graphically shows that appellant failed to avail itself of the statutory procedure for asserting a Carroll issue against the original award to Desert. Desert's application for a construction permit for KBLU-TV was filed with the Commission on November 30, 1961. On December 5, 1961 appellant filed a petition to deny the competitive application of New England Industries for the same facility sought by Desert, but appellant never amended this petition to include Desert's application. Thereafter, following New England's request that the Commission call up the renewal application of appellant's station KIVA-TV to determine whether New England

^{9/} The pertinent provisions of Section 405 of the Communications Act are set out in the Appendix, infra.

or appellant would better serve the public interest (R. 737), appellant on January 30, 1962 withdrew its petition to deny (R. 739-741), and subsequently remained silent in these proceedings until after its license for KIVA-TV was renewed on March 15, 1963 (R. 389).

Appellant gave as its reason for withdrawing its petition to deny New England's application the fact that it expected a protracted comparative hearing would take place between New England and Desert which would be of such extended duration, perhaps as long as two years, that it could not forecast the economic impact on its own operations two years hence (R. 740-741).^{10/} The withdrawal of New England's application on May 31, 1962 left Desert as the sole remaining applicant for Channel 13 in Yuma. At that time it was apparent that appellant's reason for withdrawing its petition to deny no longer obtained. Nevertheless, appellant offered no objection to the grant of Desert's application during the seven-week period between May 31, 1962 and July 23, 1962, the day on which the Commission awarded the Desert construction permit, nor did it thereafter file any petition for reconsideration of the Commission's order.

Its omission in this latter respect assumes heightened significance in view of the fact that on July 25, 1962, only two days after the award to Desert, the Commission also amended its rules to allocate Channels 7 and 9 to El Centro, California, which previously had no VHF channel, and on that same day, Tele-Broadcasters of California, Inc. filed an application for a new television station

^{10/} Implicit in this reason, of course, was some doubt as to appellant's entire claim of economic injury.

on Channel 7 in El Centro. It is correct, as appellant states (Br. 26), that under the then Section 1.359(i) of the Commission's rules (26 F.R. 8841) the time to file a pre-grant objection to the Desert application had expired when the New England application was withdrawn. But, certainly, if appellant was convinced that its interests would be adversely affected by the establishment of new television stations in the Yuma-El Centro area, it should have filed appropriate pleadings in objection no later than thirty days after July 23, 1962.

Appellant's explanation that it waited until April 8, 1963 before challenging the award to Desert on the grounds of competitive economic injury because it "was not aware" that the original partnership of Desert possessed the ability to put the construction permit to use (R. 111), is patently lacking in merit, and was properly rejected by the Commission (R. 64, 389) with the observation that this explanation did not justify appellant's failure to raise its alleged public interest issues at the time of the grant of Desert's construction permit. It may be emphasized that the Commission's grant of Desert's application necessarily entailed a finding that Desert was financially qualified and that it fully intended to construct a television station. Appellant could not properly rely upon its own assumption that the grant was not a meaningful one. Cf. Springfield Television Broadcast Co. v. Federal Communications Commission, ___ U.S. App. D.C. ___, ___ F.2d ___ (Case No. 17,957, decided January 9, 1964).

A reading of the provisions of Sections 309(c) and (d) of

the Communications Act further demonstrates that an application for the assignment of a construction permit does not constitute the kind of pleading against which a petition to deny on the grounds of alleged economic injury may appropriately be lodged. These Sections preclude the filing of a petition to deny any application for -

* * * consent to an involuntary assignment or transfer under section 310(b) * * * or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control, * * *

Since an application for consent to an assignment or transfer of a construction permit or a broadcast license is not subject to a petition to deny except in those cases where there is involved a substantial change in ownership or control, the implication is clear that the petition to deny must concern itself with the public interest in the assignment, and not with the original award of the license in question. For, if an assignment reopened all questions pertinent to an original grant, there would seem to be no reason for differentiating between assignments involving minor changes in ownership and assignments involving substantial changes.

It is also noteworthy in this connection that a petition to deny does not lie against an application for a station license which is filed upon completion of construction. Section 309(c)(2)(C) of the Communications Act, 47 U.S.C. 309(c)(2)(C), specifically exempts license applications filed under Section 319(c) of the Act, 47 U.S.C. 319(c). Thus, while the Commission has discretion to consider under Section 319(c) matters first coming to its knowledge

since the granting of the permit, ^{11/} it was the intent of Congress to give a high degree of protection to holders of construction permits. See Frontier Broadcasting Co. v. Federal Communications Commission, 111 U.S. App. D.C. 321, 296 F.2d 443.

In light of the foregoing, the Commission properly held that a petition to deny the assignment applications was an inappropriate vehicle for raising questions pertaining solely to the economic impact of the grant to KBLU-TV of a construction permit for a new Yuma station. ^{12/} Although appellant possessed standing to file the petitions to deny, and to raise appropriate public interest issues concerning the assignment, Camden Radio, Inc. v. Federal Communications Commission, 94 U.S. App. D.C. 312, 220 F.2d 191, rehearing denied March 17, 1955, it was not entitled to raise substantive questions which could have been, but were not, raised when the original grant was made.

Indeed, Valley's position here is essentially foreclosed by this Court's decision in Coastal Bend Television Co. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 234 F.2d 686, where the Court sustained the Commission's refusal to permit UHF television stations claiming economic injury to intervene at a late stage in hearings on applications for new VHF station. While the case was different in that the Commission had considered the particular claims

^{11/} It need not be decided here whether appellant could raise the issue of economic competition upon the filing by Desert of a license application.

^{12/} It may be noted here that appellant does not claim economic injury from the assignment of standard broadcast (AM) station KBLU.

in separate rule making proceedings, the Court held there that the public interest considerations sought to be raised were untimely even at the stage when an application for an initial construction permit was before the Commission. This was so because the questions had been determined by the original allocation by rule of the VHF channels and the subsequent rule making.^{13/} Here, Valley did not seek to present its claims either in a rule making proceeding or at the time Desert first received its construction permit. We do not urge here that Valley could not properly have raised its contention when the Desert application for a construction permit was before the Commission, but we do urge that the occasion of a subsequent partial change in ownership of the Desert station was clearly not an appropriate vehicle for raising an issue going to the basic question of the number of channels to be used for television in Yuma (and El Centro). See also Gerico Investment Co. v. Federal Communications Commission, 103 U.S. App. D.C. 141, 255 F.2d 893; Mass Communicators, Inc. v. Federal Communications Commission, 105 U.S. App. D.C. 277, 266 F.2d 681; Radio Station WOW v. Federal Communications Commission, 87 U.S. App. D.C. 226, 184 F.2d 257.

^{13/} In television, but not in the AM field, channels are allocated to communities by rule making in advance of the filing of individual applications. See Logansport Broadcasting Corp. v. United States, 93 U.S. App. D.C. 342, 210 F.2d 24.

II. THE COMMISSION CORRECTLY DETERMINED THAT APPELLANT HAD FAILED TO MAKE A PRIMA FACIE SHOWING WARRANTING A HEARING ON THE ISSUE OF COMPETITIVE ECONOMIC INJURY.

As shown in Point I, the Commission properly determined that appellant's requested issue on economic injury came too late for consideration when raised for the first time on Valley's objections to the Desert applications for assignment and extension of time to construct. The Commission also correctly found in any event that appellant failed to make a prima facie showing that the public interest in Yuma would be adversely affected if Desert were permitted to assign its construction permit and that appellant's assertions of public injury were not supported by factual allegations in its pleadings. The Commission also properly rejected the petition for reconsideration and declined to hold a hearing on its own motion.

The essence of appellant's case was that the Yuma area could not support a second television station, that the establishment of Desert's station KBLU-TV would divert so much revenue from appellant's station KIVA-TV that KIVA-TV would become a loss operation, that KIVA-TV eventually would be forced out of business, and that even KBLU-TV would not be able to survive. The Commission found, however, that the statements submitted by appellant in its pleadings did not support the foregoing conclusions. Thus, the Commission observed (R. 64) that appellant admitted that there were increases in population and retail sales in the Yuma area and improved net earnings for station KIVA-TV in 1962, all of which would indicate that Yuma was more capable of supporting two stations currently than it was in July 1962. The Commission further pointed out (R. 65)

that appellant had made an insufficient showing that any loss of revenue it might sustain would necessarily lead to a loss or degradation of program service in the area.

Corroboration for the Commission's initial opinion of August 9, 1963, was furnished by the appellant, itself, when it filed its petition for reconsideration on September 9, 1963 (R. 176-364), and submitted in support thereof an economic analysis of the Yuma and El Centro areas prepared by Dr. Irston R. Barnes. As the Commission held (R.390), the Barnes Report should have been presented prior to, and not after, the grants had been made. Springfield Television Broadcast Co. v. Federal Communications Commission, ___ U.S. App. D.C. ___, ___ F.2d ___ (Case No. 17,957, decided January 9, 1964). But the Commission looked at the Report despite its late submission, and found no compelling reason based upon it to warrant reconsideration (R. 391).

As noted in the Counterstatement of the Case, supra, Dr. Barnes' analysis showed that Yuma County had experienced a dramatic growth in population and in economic activity during the period 1950-1960, and that its growth was expected to continue, although at a more modest rate. Dr. Barnes' report showed that the profits of KIVA-TV had increased by more than 700% during the period 1960 through 1962, with profits before taxes of \$5,303 in 1960, \$22,594 in 1961, and \$40,625 in 1962, during each of which years KIVA-TV had set aside depreciation reserves in excess of \$36,500 (R. 284,326). It was Dr. Barnes' estimate that if two stations operated in the area, total advertising revenues for two stations would increase from the \$399,538 earned by KIVA-TV for the year ending March 31, 1962 to \$464,783 (R.324). Thus, on Dr. Barnes' own analysis, if station KBLU-TV had revenues of \$90,000, including all of the \$65,200 in increased total revenues, it would take about \$24,800 from KIVA-TV, leaving that station with a substantial net profit.

It would seem, then, that if any conclusion at all may be drawn from the economic survey material furnished by appellant, it is that the Yuma area at the present time can readily furnish both KIVA-TV and KBLU-TV the gross revenues required by the two stations for profitable operation, and that appellant's predictions of economic ruin and ultimate loss of public service are unsupported by any substantial basis in fact. The Commission was manifestly correct in finding that the appellant had failed to make a prima facie showing under Section 309(d) of the Communications Act that the grant of Desert's assignment applications would be inconsistent with the public interest.

The Commission also properly rejected Valley's request to consolidate the Yuma applications of Desert with the applications for two new stations in El Centro, California. The Commission noted (R. 64) that Valley sought a consolidated hearing on May 9, 1963, more than thirty days from the March 8, 1963 public notice of acceptance of the filing of the Yuma applications. It was therefore untimely under Section 1.359(i) of the Commission's rules, 47 CFR (Jan. 1, 1963 Supp.) 1.359(i), if considered as part of the petition to deny. The two El Centro applications had been granted on April 10, 1963, after being on file for several months, so there is no apparent reason for Valley's delay in making this request. Furthermore, although Valley's brief treats El Centro and Yuma as one area, it does not demonstrate that the Commission was incorrect in refusing to

consider the two cities, fifty miles apart, as one "market."^{14/} The Commission also rejected consolidation when Valley sought it in connection with the El Centro grants at the time it filed petitions for reconsideration of those grants. The Commission's rejection of Valley's El Centro petitions are now on appeal before this Court. Valley Telecasting Co., Inc. v. Federal Communications Commission, No. 18,092. By order of January 6, 1964 the Court denied a motion by Valley to consolidate Case No. 18,092 with this case.

It may be emphasized that any petition to deny a pending application which is grounded on an alleged Carroll issue must stand or fall on the claim that the public interest rather than the petitioner's own interest will be harmed. The law is well settled that economic injury to an existing licensee is not a ground for denial of a new, competing broadcast application, unless there is resultant harm to the public interest. Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470. See also Carroll Broadcasting Company v. Federal Communications Commission, 103 U.S. App D.C. 346, 349, 258 F.2d 440, 443, where this Court stated that "economic injury to an existing station, while not in and of itself a matter of moment, becomes important when on the facts it spells diminution or destruction of service."

Appellant thus is in error when it asserts in its brief

^{14/} Although Valley does not recognize it (see App. Br. 24-25), this was a ruling that there was no need for a hearing under Section 307(b) of the Act, 47 U.S.C. 307(b), on an issue of economic mutual exclusivity between Yuma and El Centro. See R. 64-65.

(p. 14) that in this case, "injury to appellant and injury to the public are identical and co-extensive," for it did not in fact follow, despite appellant's assertion, that a reduction in appellant's gross revenues would cause any degradation of television service in the Yuma area. And, of course, a community which is served by two competing television stations manifestly has more choice and a greater variety of programming than a community which is served by only one station.

In filing its petitions to deny under the provisions of Section 309(d) of the Communications Act, appellant was required to meet the standards of that section, which provides that an application shall be set for hearing if a substantial and material question is presented by a petition to deny. The petition is required to show "that a grant of the application would be prima facie inconsistent" with the public interest, and to contain allegations of fact supported by the affidavit of a person or persons with personal knowledge thereof. Section 309(d) (1). The Commission properly held that appellant did not meet this standard.

Petitions to deny filed under Section 309(d) were expected by Congress to make:

* * * a substantially stronger showing of greater probative value than is now [was] necessary in the case of a post grant protest. The allegation of ultimate, conclusionary facts or mere general allegations on information and belief, supported by generalized affidavits, as is now [was] possible with protests, are not sufficient. * * *

S. Rept. No. 690, 86th Cong., 1st Sess., p. 3. 15/

15/ The post-grant protest referred to was that provided for in the then Section 309(c) of the Communications Act (prior to the 1960 amendments), which gave the Commission little discretion to deny a petition for a hearing. See Federal Broadcasting System, Inc. v. Federal Communications Commission, 96 U.S. App. D.C. 260, 263, 225 F.2d 560, 563, cert. denied, 350 U.S. 923, holding that (continued)

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The Commission is to "be guided by rules applicable to a motion for summary judgment rather than, as under the present protest procedure, to a demurrer." S. Rept. No. 690, 86th Cong., 1st Sess., p. 4.

It should be noted in this connection that the statute provides no separate standard for allegations concerning competitive economic injury as opposed to allegations of other public interest considerations, and we do not read this Court's decision in the case of Carroll Broadcasting Company v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F.2d 440, as creating an individual standard. We recognize that there is language in the Carroll opinion to the effect that an offer to prove public injury is sufficient to require the holding of a hearing. However, the Carroll case did not concern the question presented here of the sufficiency of allegations. In that case there had already been an adjudicatory hearing, including an economic injury issue, and the issue on appeal was the validity of the Commission's ruling that economic injury could not be a relevant public interest factor even if it resulted in public harm. Therefore, we believe that the language of the opinion with respect to an offer of proof must be read in its context, and that the question presented in this case is in no sense determined by the Carroll decision.

15/ (Cont'd) what was required of a protest under Section 309(c) was "merely an articulated statement of some fact or situation which would tend to show, if established at a hearing, that the grant of the license contravened public interest, convenience, and necessity, or that the licensee was technically or financially unqualified, contrary to the Commission's initial finding." The wording of Section 309(c) was changed somewhat in a subsequent revision in 1956, 70 Stat. 3, at which time Congress also added a clause permitting denial of a requested hearing if, after oral argument, the Commission found that the facts alleged, even if true, presented no grounds for setting aside the grant.

In sum, Section 309(d) reflects an intention by Congress that a hearing not be required in the absence of substantial factual allegations which fill out the content of ultimate claim. The Commission's interpretation of that requirement is clearly reasonable, particularly in light of the fact that the section requires a hearing, with the attendant delay in service, upon allegations which are entirely within the control of the objecting party and are founded upon whatever investigation of the facts he has made. It serves no public purpose to hold a hearing in the absence of a substantial likelihood that pertinent information will be elicited. Appellant in this case did not supply good cause for the requested hearing.

Appellant relies further (Br. 28-29) on a series of recent Commission decisions as indicating that the Commission suddenly and without notice imposed a higher standard for pleading economic injury issues. However, it is well established that the rule of stare decisis is not applicable to Commission decisions and that, accordingly, a reasonable decision is not rendered invalid because it indicates some shift in policy. Federal Communications Commission v. WOKO, Inc., 329 U.S. 223, 227-228; Kentucky Broadcasting Corp. v. Federal Communications Commission, 84 U.S. App. D.C. 383, 174 F.2d 38, 40; Pinellas Broadcasting Co. v. Federal Communications Commission, 97 U.S. App. D.C. 236, 230 F.2d 204, cert. den. 350 U.S. 1007.

In this field, particularly, where each pleading must be judged on its own contents in the context of differing economic situations, it is extremely difficult to make valid comparisons. In any event, we do not believe there has been any arbitrary departure from

a fixed policy. A brief discussion of the cases relied upon by appellant will make this clear. Significantly, none of these cases involved applications for television stations, but rather dealt with standard broadcast (AM) radio stations in very small communities, each allegedly too small to support more than one station, where the single existing station was operating, as a rule, unlike appellant, at no better than a marginal basis.

In Haggard and Rogers, 24 Pike & Fischer, R.R. 670, a licensee in Carrizo Springs, Texas, a city of 5,700, filed a petition to deny an application for a new standard station at Crystal City, Texas, a community of 9,100, approximately 9 miles away. The licensee claimed that its station had been a loss operation, and was being currently operated at reduced hours with a skeleton staff.

In Bigbee Broadcasting Co., 24 Pike & Fischer, R.R. 497, a second standard broadcast station was proposed for Demopolis, Alabama, a city of approximately 8,000, where 50% of the wage earners had substandard incomes. The existing station had earned only nominal profits since 1957.

The case of Geoffrey A. Lapping, 23 Pike & Fischer, R.R. 919, involved an application for a second standard broadcast station in Blythe, California, a community of 6,023. The sole existing station in Blythe was a marginal operation.

John Self, 24 Pike & Fischer, R.R. 1177, involved a petition for reconsideration filed by a licensee in Hamilton, Alabama, a community of 1,934, directed against the grant of a construction permit for a standard broadcast station at nearby Winfield, Alabama,

a community of approximately the same size. The petitioner pointed out that the area had incurred a population loss, and that the revenues of its station had been declining.

In Rhineland Television and Cable Corp., 24 Pike & Fischer, R.R. 1183, the licensee of the sole station in Rhineland, Wisconsin, a community of 8,790, filed a petition to deny an application for a second standard broadcast station in that city, alleging that the city was too small, that its maximum revenue potential was too inadequate to support two stations, and that the community had been designated in need of assistance under the United States Area Re-development Act.

The foregoing recitation shows certain obvious differences between the case here on appeal and the cases above listed. Obviously, the economics involved in the case of a television station are substantially different from those involved in the case of small standard broadcast (AM) radio stations. In addition, there are marked population differences. Appellant's station serves not only Yuma County, with a current population estimated at more than 50,000, but in addition serves the greater part of Imperial County, California, with a population in excess of 70,000. None of the cases listed above involved a city of more than 9,500. Finally, appellant's station has enjoyed marked financial success in the past three years, and is located in an area where there has been rapid population growth and rapid economic expansion. In the cases listed above, many of the communities have been confronted with adverse economic conditions or with the problems of dwindling populations, and the stations involved

have, for the most part, been operating on a marginal basis.

Although appellant contends that the Commission has imposed on it a higher and different standard of pleading under Section 309(d) than it has required of parties in the cases just discussed (Br. 28-30), we think it clear that the other decisions, which do not announce any different standard, were merely thought by the Commission to differ on their facts. Certainly, in the absence of a clear showing of arbitrary action, the question is whether the facts before the Commission in this case supported its decision. No such showing of arbitrary action has been made.^{16/}

The Commission properly held that all the material submitted by Valley considered together did not warrant a hearing, even if it were assumed to have been timely filed. Nor do we believe, for the reasons given above, that any inconsistency of the Commission furnished an adequate reason for Valley to come forward at the last minute with the additional material (the Barnes Report) submitted for the first time on reconsideration. See Springfield Television Broadcast Co. v. Federal Communications Commission, ___ U.S. App. D.C. ___, ___ F.2d ___ (Case No. 17,957, decided January 9, 1964);

^{16/} It may be noted that the Commission's rejection here of appellant's demand for an economic injury issue was not the first such decision. See, e.g., Tri-Cities Broadcasting Co., 24 Pike & Fischer, R.R. 691, where a petitioner sought unsuccessfully to raise an economic issue for the first time on a petition for reconsideration; KTBS, Inc., 25 Pike & Fischer, R.R. 301; Missouri-Illinois Broadcasting Co., 1 Pike & Fischer, R.R. 41 (the appeal from this opinion is now before this Court as the case of KGMO Radio-Television, Inc. v. Federal Communications Commission, No. 18,064). In light of the foregoing discussion, we think there is no warrant for the claim of an arbitrary reversal of policy.

Colorado Radio Corporation v. Federal Communications Commission, 73 App. D.C. 225, 118 F.2d 24. That the Colorado Radio case involved a request to submit additional evidence after a hearing hardly distinguishes it in principle. The Commission has a right to expect that an objecting party will give it the benefit of all relevant factual allegations in the party's possession. Valley's somewhat ambivalent position with respect to the Desert application, which persisted at every stage of Commission consideration, does not furnish support for the claim that relevant matter was improperly ignored. Finally, there was no abuse of discretion in not setting the matter for hearing on the Commission's own motion since, as the Commission held (R. 391), and we have shown, no matter warranting the exercise of such discretion was before it.

CONCLUSION

For the foregoing reasons, the Commission's decision should be affirmed.

Respectfully submitted,

MAX D. PAGLIN,
General Counsel,

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ERNEST O. EISENBERG,
Counsel.

Federal Communications Commission
Washington, D.C. 20554

March 23, 1964.

APPENDIXSTATUTES AND RULES INVOLVEDCommunications Act of 1934, as amended (47 U.S.C. 151 et seq.)

Section 309(d)(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e).

Section 305(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

Section 405. After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 5(d)(1), any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 5(d)(1), in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. A petition for rehearing must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1)

was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: PROVIDED; That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission shall take such action within ninety days of the filing of such petition. Rehearing shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. The time within which a petition for review must be filed in a proceeding to which section 402(a) applies, or within which an appeal must be taken under section 402(b) in any case, shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed with the Commission in such proceeding or case, but any order, decision, report, or action made or taken after such rehearing reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order.

BRIEF FOR INTERVENOR

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,267

VALLEY TELECASTING CO. INC.

Appellant.

FEDERAL COMMUNICATIONS COMMISSION.

Appellee.

DESERT TELECASTING COMPANY INC.

Intervenor.

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(i)

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No. 18,267

VALLEY TELECASTING CO., INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

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Intervenor.

On Appeal From Decisions of the
Federal Communications Commission

BRIEF FOR INTERVENOR

SUMMARY OF ARGUMENT

I

The Commission did not act inconsistently in finding (1) that appellant had standing to protest the grants to KBLU-TV, but (2) that sufficient facts were not alleged by appellant to warrant a hearing. The

test of injury is different in these two instances: To show standing, a party only needs to show some significant injury to itself (i.e., loss of revenues) from the competition of a new station. To show an adverse effect on the public, so as to warrant a hearing, injury to the public interest must be shown. This could be shown only by demonstrating a net loss of service to the public. Thus, if appellant's station KIVA should suffer some loss of revenue, but the public gains program service because there are now two stations in Yuma instead of only one, there can be no resultant harm to the public interest.

II

Although appellant submitted voluminous pleadings designed to prove that Yuma cannot support two television stations and that the advent of KBLU-TV will cause the demise of appellant's station KIVA, the figures themselves actually indicate that, at least in the most recent year shown, KIVA has been operating at a profit which was large enough to enable KIVA to continue operating even in the face of new competition from appellant's station. Furthermore, other facts which have been shown concerning the Yuma market indicate a potential for greater revenue by both stations than KIVA alone has hitherto realized, thus indicating the likelihood that both stations can continue operating, with resultant benefit to the public.

III

Although appellant presented certain of its claims and evidence in untimely fashion, the Commission nevertheless considered the substance of appellant's pleadings on the merits, in accord with its usual custom. Thus appellant cannot claim correctly that the Commission's finding of "untimeliness" actually operated to preclude consideration of any of its claims. Nor is it material to this appeal that, in making the original

grant for KBLU-TV in 1962 without opinion, the Commission may not have considered certain earlier filed pleadings. This is so because, in reaching the decisions here appealed from, the Commission did consider appellant's pleadings which recited those earlier-filed matters.

ARGUMENT

I. The Commission Did Not Err In Denying Appellant's Pleadings on Their Merits While Holding That Appellant Had Standing To Protest the Grant to Intervenor

Appellant in its brief attacks as inconsistent the Commission's actions in (1) finding that the appellant had standing to protest the grant of the KBLU-TV assignment and (2) finding that no injury to the public had been shown (pp. 14-19). It should be noted that the alleged inconsistency exists only if one accepts appellant's evaluation of the likelihood that its Station KIVA will be forced to cease operating due to the effects of competition from KBLU-TV. The Commission found that appellant failed to make a prima facie showing that the dire results it predicted from the advent of KBLU-TV service would come to pass.

The injury to appellant and possible injury to the public are not identical and co-extensive, despite appellant's claim that they are (page 14). On the contrary, the test of standing to protest and the test of ultimate harm to the public interest are quite different. Standing to protest depends on a showing that the protesting station faces the likelihood of some significant loss of revenue if the new station begins operations. On the other hand, in order for the protestant to show likelihood of injury to the public, the protestant must demonstrate that there will be a net loss of service to the public despite the fact that the city will have two television services in place of only one. Thus, if a protestant shows likelihood that it will suffer some adverse economic impact from the

advent of new competition, nevertheless the public may well be better off because of a net gain in program service. Even if the older station is forced to curtail its program service due to declining revenue, the new station's service may more than compensate for that. Only if the old station is forced to go dark, and if the new one does not offer a service equivalent to what the old one offered, is the public hurt. Appellant here failed to demonstrate the likelihood of such severe harm to KIVA.

II. Appellant's Lengthy Pleadings Were Factually Insufficient To Demonstrate the Likelihood of the Effects It Predicted

Appellant argues that a hearing was necessary because issue was joined on various points in the pleadings before the Commission, and because factual disputes were presented (Brief, page 21). However, this misses the point that the burden is on the protestant to demonstrate the likelihood of injury to the public, regardless of what other parties may do. Appellant seems to assume that its showing must have met this burden because the data submitted, especially the "Barnes Report" submitted with appellant's "Petition for Reconsideration" on September 9, 1963 (R. 176) was voluminous and contained a wealth of data on economic conditions in the Yuma area. The trouble with this argument is that the data submitted, however voluminous, did not actually present a convincing picture to support appellant's allegations. For 1962, the Barnes Report (page 119) stated that appellant's station KIVA had profits of \$40,625, in addition to an allowance of \$36,568 for depreciation and amortization. These figures represent an excess of \$77,193 in revenues received above cash expenses for 1962. This does not support appellant's dire predictions that KIVA will be forced to go dark if intervenor's station KBLU-TV achieves any substantial success in attracting advertisers. In estimating the likelihood that KIVA will suffer severe losses in revenue because of the advent of KBLU-TV, it should be noted that appellant in its

"Reply to Oppositions to Motion for Stay," filed on December 19, 1963, in this Court, was able to attach just one letter of cancellation from a local advertiser, although KBLU-TV went on the air on December 2. In view of the number of days which had passed since KBLU-TV had started broadcasting, this is not a very persuasive showing.¹

The Barnes Report indicates in a number of places that KIVA had been receiving revenue which was considerably below the average in markets of its size. For instance, Dr. Barnes noted (page 80) that the revenues achieved by KIVA in each year have been less than half of the median figures for comparable markets of its size. This suggests that the Yuma market has a substantial potential, hitherto untapped, for more television revenues. There are indications that KIVA was by no means making maximum efforts to tap this market. For instance, during the period covered by the Barnes Report (see page 95) KIVA did not even maintain a studio in Yuma for the convenience of local residents, but had its studio in the desert 8 miles away. There was no showing that any public transportation was available to the studio in the desert. Furthermore, the owners of appellant corporation also own the local community antenna television (CATV) system in Yuma, which offers competition with KIVA's programming by making available in Yuma the programs of stations located in Los Angeles and other large cities. The existence of this CATV system is important in judging the merits of appellant's claim that KBLU-TV will necessarily lure away enough of KIVA's viewers and advertisers to cause an important, perhaps fatal, decline in KIVA's revenues. This CATV system has been established and has grown because of the desire of Yuma residents for a choice of television fare. Without

¹ In its claims of loss from the advent of KBLU-TV and from the El Centro stations, appellant alleges (Brief, page 10) that it lost its ABC network affiliation to an El Centro permittee. Since neither El Centro station has been built, it is difficult to see how ABC's decision to drop KIVA could be attributed solely to issuance of a permit in El Centro.

it, they are solely dependent on KIVA for programs. Thus, the persons who now pay \$7.50 per month for the privilege of watching the programs of distant stations on CATV are potential viewers of local Yuma stations, and they can reasonably be expected to switch in large numbers from CATV viewing to watching Yuma stations, now that a choice of programming is available to them on local Yuma television. Thus the local TV audience is not a fixed and static number of people, as appellant would have us believe. On the contrary, it is clear that two TV stations in Yuma can be expected to attract a larger audience than KIVA enjoyed when it was the only station there, and KIVA has been enjoying enough margin of profit so that some decline in revenues is not likely to drive KIVA into the red so as to cause it to go silent.

III. The Commission's Decision Was Not Dependent on Merely Procedural Grounds, But Disposed of Appellant's Allegations on the Merits

Appellant's Brief (pages 25 et seq.) makes much of the Commission's finding that appellant was untimely in submitting its protest against the grant of the KBLU-TV assignment application, instead of against the original application for a construction permit for KBLU-TV (filed November 30, 1961), and of the further finding that appellant was untimely in submitting the "Barnes Report" with its petition for reconsideration (R. 176) instead of with its original petition to deny. However, these matters of timeliness are not material to the disposition of this appeal. This is so because the Commission did not refuse to pass on the substance of appellant's claims. The Commission gave as alternative grounds for its denial of relief to appellant the untimeliness of its pleadings and the fact that, on the merits, there was no prima facie showing that the grant to KBLU-TV would be contrary to the public interest. This is in accordance with the Commission's usual custom of considering

claims concerning the public interest, regardless of timeliness. The Commission adds issues or sets applications for hearing on its own motion where a request is received which is procedurally defective (e.g., late) but which presents facts warranting a hearing. In view of this practice of the Commission, appellant did receive a full consideration of its claims below.

Appellant also takes the Commission to task for not considering facts in its files (contained in appellant's petition, filed December 5, 1961, to deny the application of New England Industries for a new TV station) purporting to show that Yuma could not support another television station in addition to KIVA. However, the Commission Decisions from which appellant here appeals were not defective because of the Commission's earlier actions in granting the original application for the KBLU-TV construction permit, and the application for assignment of KBLU-TV. This is so because, when appellant first filed a pleading against KBLU-TV, on April 8, 1963, it recited whatever facts it then thought pertinent to show the harm to the public from the assignment application, and of course appellant was free to bring forward, either verbatim or by incorporation by reference, such of its earlier allegations as it considered to be still material. The allegations which appellant made in its pleading of April 8, 1963, and subsequent pleadings were fully considered by the Commission. Thus there is no logical reason to fault the Commission's decisions on appeal here because in an earlier grant on July 23, 1962, the Commission did not expressly consider pleadings filed earlier in another proceeding by appellant.

CONCLUSION

For the foregoing reasons, the Commission's decisions should be affirmed.

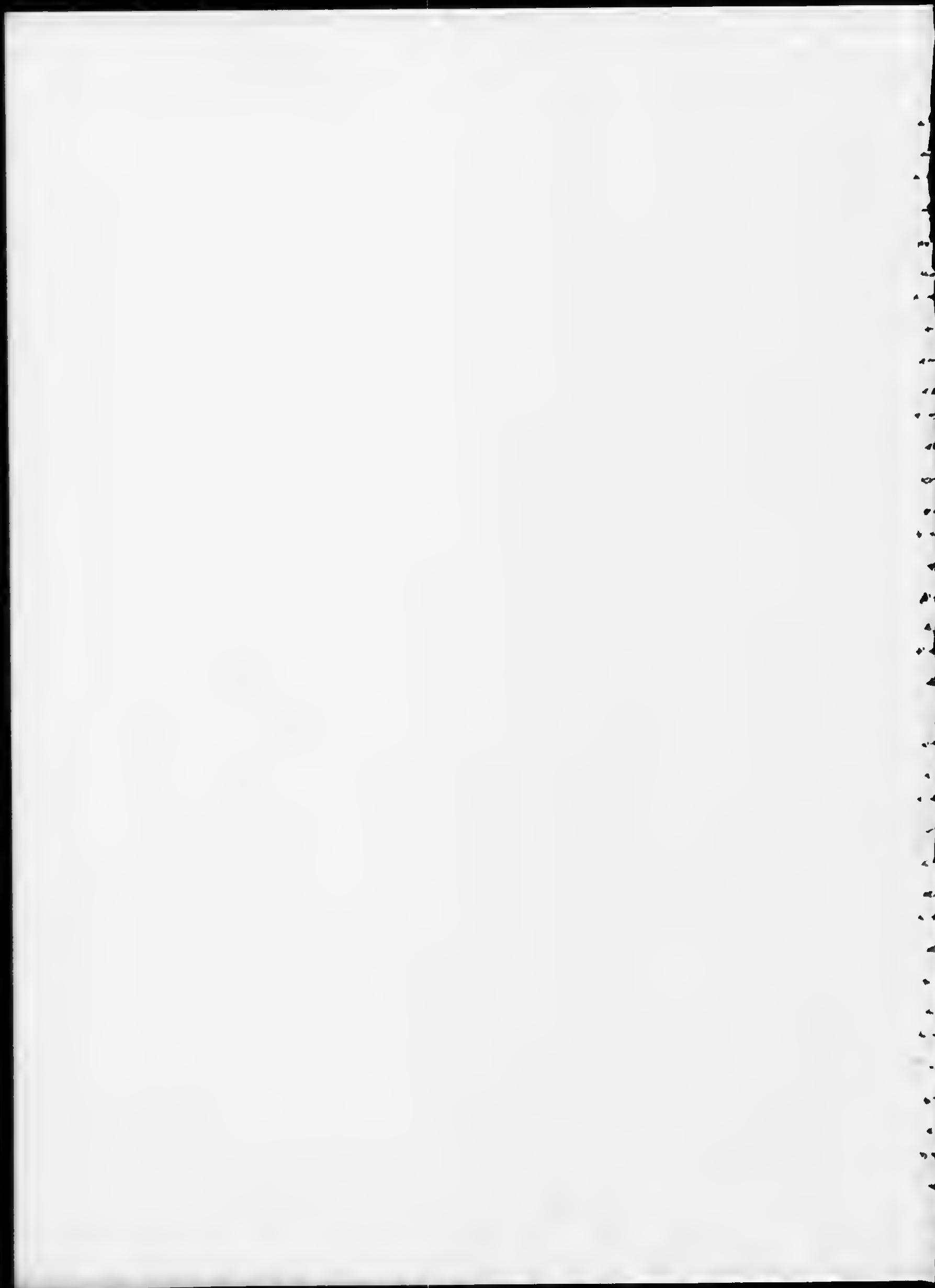
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**PETITION FOR REHEARING
OR RECONSIDERATION EN BANC**

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,267

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 10 1964

Nathan J. Paulson
CLERK

VALLEY TELECASTING CO., INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

DESERT TELECASTING COMPANY, INC.,

Intervenor.

On Appeal from Decisions of the
Federal Communications Commission

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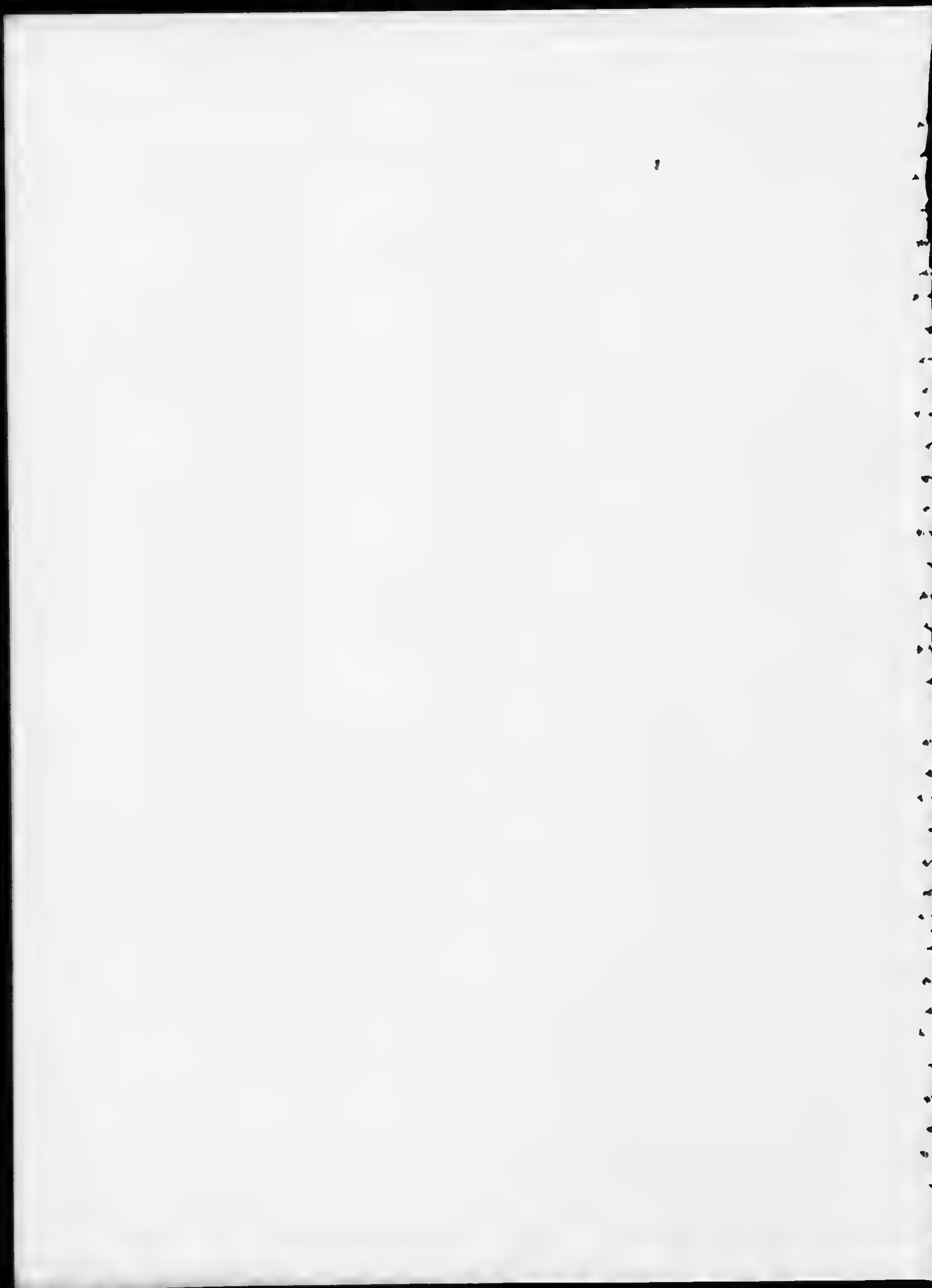
Intervenor.

On Appeal from Decisions of the
Federal Communications Commission

PETITION FOR REHEARING OR RECONSIDERATION EN BANC

Valley Telecasting Co., Inc., appellant in the above-entitled proceeding, respectfully petitions the Court to reconsider or rehear en banc appellant's Motion for Stay, which was denied by a panel of this Court on December 26, 1963.

Reconsideration is justified because (1) the denial of the stay in this case conflicts with the decision of a different panel of this Court in KGMO Radio-Television, Inc. v. Federal Communications Commission,



Case No. 18,064, now pending before this Court, and (2) unless the stay is granted, relief on the merits may be ineffectual and too late. A discussion of these grounds follows:

(1) Denial of Stay Resulted in Conflicting Rulings by Different Panels of the Court

In KGMO Radio-Television, Inc. v. Federal Communications Commission, Case No. 18,064, sometimes referred to herein as "the Cape Girardeau Case," an existing standard (AM) broadcast station (KGMO) in Cape Girardeau, Missouri, filed with the Federal Communications Commission a petition for reconsideration and request for stay of the Commission's March 13, 1963, order granting, without hearing, the application of intervenor for a permit to construct a new AM station in Cape Girardeau.¹ KGMO alleged that the economic effect of an additional radio station in Cape Girardeau would be detrimental to the public interest and requested that the Commission afford it an opportunity to present proof of this contention at a hearing.

In its petition for reconsideration, KGMO alleged that its service area is economically depressed; that substantial problems of unemployment exist therein; that a part of the area was classified as a redevelopment area by the United States Department of Commerce; that the existing services and other competitive services (six radio stations, one television station, three daily and ten weekly newspapers) are ample; that during the fiscal year ending August 31, 1962, KGMO had broadcast revenues of \$64,670.45, expenses of \$73,263.35, other income of \$392.82 with a resultant net loss from operations of \$8,200.08; that the proposed new station estimated that its revenues for its first year of operation would be \$46,000.00; that based on KGMO's experience in the area, a substantial amount of such estimated revenues would have to come out of

¹ Appellant in Cape Girardeau filed no petitions to deny or other objections and did not in any way participate in the licensing proceeding of the new station before the filing of the petition for reconsideration.

revenues now earned by appellant; that the consequent operating losses would force it to reduce its expenses and would cause the eventual curtailment or discontinuance of some of KGMO's public service programming and that, ultimately, neither licensee would be able to provide the services needed by the public in the area.

The Commission denied a hearing on grounds that KGMO's factual allegations in support of its request for a hearing under Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F. 2d 440 (D.C. Cir., 1958) were "too generally stated" and "not sufficiently related to the conclusions drawn by the petitioner [KGMO] to show prima facie that a grant of the application would be inconsistent with a finding that it would serve the public interest, convenience and necessity, or to raise any substantial or material facts . . ." An appeal followed (Case No. 18,064) and, upon the request of appellant, a stay was imposed by this Court pending decision on the merits.

In the instant case, appellant, the only television station (KIVA) in Yuma, Arizona, filed a petition under Section 309 (d)(1) of the Communications Act [47 U.S.C. §309 (d)(1)] to deny applications for the assignment of a construction permit for a new television station (KBLU-TV) and for an existing radio station (KBLU) from a partnership to a new corporation, Desert Telecasting Co., Inc.¹ Appellant contended in its pleadings that the partnership which then held the KBLU-TV construction permit (which permit issued in spite of and without disposing of a prior petition to deny, filed by appellant on economic grounds, against an application which was mutually exclusive with that of the later KBLU-TV permittee) was unwilling or unable to construct the proposed station and, therefore, presented no threat to appellant or the public. However, the assignment of this permit to a willing and solvent corporate assignee would raise

¹ Appellant also asked that the application for extension of time in which to construct Station KBLU-TV be denied.

the spectre of destructive economic competition, inimical to the public interest because (1) the television revenues in Yuma and its area were scarcely sufficient even to support the existing station, (2) the additional \$90,000 revenue, estimated to be needed by KBLU-TV during its first year of operation, was not available, (3) if such revenue, or any part of it, were realized by KBLU-TV, it would necessarily come out of KIVA's present revenue sources, thereby rendering KIVA a perennial loss operation, (4) that such revenue diversions would force KIVA off the air, and that (5) the demise of KIVA would leave a sizeable population over a large area without any television service because KBLU-TV's coverage area, at a lower power and antenna height, would be much smaller than KIVA's and would have no other television service from United States stations.

Moreover, in motions to consolidate, appellant also pointed out that two new permits to construct television stations in El Centro, California, (also within KIVA's market and coverage area) had been granted and that the economic chances of KBLU-TV and of KIVA-TV surviving must be weighed with such added competition in mind. The three stations proposed to obtain \$347,000 in aggregate revenues during their first year of operation — an obviously impossible task in the thin market involved. These three new applications were, therefore, also mutually exclusive with each other. Appellant offered to prove in a hearing that, under the circumstances, the assignment of the permit, which would result in the establishment of an additional station in Yuma, was contrary to the public interest.

The Commission denied appellant's petition on the ground that, assuming that its pleadings were timely,¹ appellant failed to allege facts with sufficient particularity which would warrant a hearing on the economic

¹ The Commission also held that appellant should have raised its charges against the original grant of permit to KBLU-TV rather than the assignment application even though the Commission found that appellant had standing to protest the assignment.

injury issue. This was precisely the same ground upon which it denied the petition of the appellant in the Cape Girardeau case.

Thereupon, appellant employed a noted economist to prepare a detailed, preliminary economic study of the television market in the Yuma-El Centro area, which affirmed the ultimate facts and conclusions of its prior pleading. The Barnes Study¹ was attached to a petition for reconsideration filed with the Commission on September 9, 1963, the denial of which on December 9, 1963, is the subject of this appeal. The same economic study was also submitted by appellant in its Motion for Stay filed in this Court. It concluded that the Yuma-El Centro area would not be able to support another television station, without the diminution or destruction of service, for five to ten years.²

An expert television engineering study, also submitted to the Commission with the petition for reconsideration, and attached to appellant's Motion for Stay filed in this Court, showed that if KIVA is driven off the air by KBLU-TV, there would be a loss of Grade A service to 8,211 of the 38,984 persons now served by KIVA and a loss of Grade B service to 60,465 of the 97,460 persons now receiving such service from KIVA. No party disputed the accuracy of this engineering showing. In spite of the detailed facts offered to show the destructive economic competition and resulting loss of service contrary to the public interest, the Commission denied appellant's petition for reconsideration, again holding that the facts alleged did not present matter so compelling as to require a hearing under the Carroll doctrine.³

¹ "Opportunities for Competition in Television Operations in the Southern Arizona-California Border Region" by Dr. Irston R. Barnes.

² The 147-page report, replete with charts, tables, and economic facts, analyzed the area's population and employment characteristics, considered agriculture, trade, government services, construction, manufacturing, mining, finance, insurance, real estate, compared the area with other markets, and based its forecast of the dire economic consequences of television competition on these and a multitude of other economic facts. A brief summary of these factors was set forth in appellant's Motion for Stay.

³ Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F. 2d 440 (D.C. Cir. 1958).

In its Motion for Stay in this Court, appellant demonstrated to the Court that, in addition to the heavy financial losses during the first nine months of the current fiscal year (i.e., a \$45,000 loss through the end of November, 1963), KIVA has also lost its affiliation with two networks. The CBS network transferred its affiliation to KBLU-TV. As a result, KIVA has lost approximately \$5,000 per month in network revenues because of the new competition. KIVA also attached to its Motion for Stay a letter of cancellation in which the Valley National Bank transferred its business to the new station, causing a revenue loss of \$3,600 per year to KIVA.

Thus, the appeal in Cape Girardeau and the appeal in this case are grounded upon the same basic argument on the merits: that the Commission erred in requiring appellants to adhere to new pleading standards in making out a prima facie case under the Carroll doctrine. In the motions for stay in both cases the same type of showing of irreparable harm was made. If anything, the only difference between the showing on the Motion for Stay in the instant case and in Cape Girardeau, was that, while appellant in Cape Girardeau made a convincing showing, appellant's showing of irreparable harm in this case was more detailed, was based upon professional studies and was far more conclusive than that in Cape Girardeau. Moreover, the appellant in Cape Girardeau brought its economic facts and arguments to the attention of the Commission only after a grant, in the form of a petition for reconsideration. In contrast, appellant herein availed itself of the pre-grant proceedings by filing petitions to deny. In Cape Girardeau the Motion for Stay was designed to protect the existing licensee from future competition foreshadowed by an unlawful grant, while in the instant case relief is sought from the clear and present danger of immediate and existing destructive competition

caused by an even more obviously unlawful grant.¹

In summary, if distinguishable at all in their salient characteristics, the instant case is distinguishable from the Cape Girardeau case only because appellant herein has made out a stronger case of economic injury, a stronger showing of immediate and irreparable harm to itself and to the public, a greater likelihood of success on the merits, and a more flagrant violation, by the Commission, of its duty to protect the public interest. Yet, a stay was granted in the Cape Girardeau case and denied in the instant case. This fact alone should prompt this Court, sitting en banc, to reconsider the ruling of its panel denying appellant's Motion for Stay.

(2) Refusal of Interim Relief Irreparably Deprives Appellant and the Public of Relief on the Merits.

Appellant alleges, on amply documented factual grounds, that the addition of one more television station in the Yuma-El Centro market would cause destructive competition which would ultimately degrade and destroy service to the public. Its offer to prove these facts was rejected by the Commission. Economic injury to an existing licensee, of course, is of no particular moment by itself. It is the injury to the public which the law is designed to protect. And diminution or destruction of service

¹ The Commission also stated that the economic facts presented by appellant before and after the grant of the assignment application should have been presented before the original permit grant was made. In light of this Court's interpretation of Section 310(b) of the Communications Act, which subjects assignment applications to the pre-grant proceedings of Section 309(d)(1) in the same manner as if they were original applications for permits to construct (Camden Radio v. Federal Communications Commission, 94 U.S. App. D.C. 312, 220 F. 2d 191 (1954) reh. den. March 17, 1955), this contention is without merit. Moreover, in any event, the Commission should not have closed its eyes to the public interest questions involved in appellant's pleadings and should have ordered a hearing under Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F. 2d 440 (D.C. Cir. 1958). See Clarkburg Publishing Co. v. Federal Communications Commission, 96 U.S. App. D.C. 211, 255 F. 2d 511 (D.C. Cir. 1956); Michigan Consolidated Gas Co. v. Federal Power Commission, 108 U.S. App. D.C. 409, 283 F. 2d 204 (D.C. Cir. 1960) cert. den. 364 U.S. 913.

to the public was held by this Court to be contrary to the public interest. Carroll Broadcasting Co. v. Federal Communications Commission, *supra*. Therefore, while appellant's standing to prosecute the appeal flows from its right as "a person aggrieved or whose interests are adversely affected,"¹ it has standing in this case only as a representative of the public interest. Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470, 477; Scripps-Howard Radio v. Federal Communications Commission, 316 U.S. 4, 14. And, as the Supreme Court pointed out in the Scripps-Howard case:

An historic procedure for preserving rights during the pendency of an appeal is no less appropriate — unless Congress has chosen to withdraw it — because the rights to be vindicated are those of the public and not of the private litigants. 316 U.S. at 15.

In the instant case the ultimate, irreparable injury to the public is the gravamen of appellant's case on the merits. On a motion for stay the additional requirement is to show that such injury would occur before a decision on the merits can be reached. Appellant fully sustained its burden in this regard.

The forecast of the Barnes Report, that "inevitably, KIVA would become a deficit operation in the first year in which there was either two-station or three-station competition" (p. 119); that diversions of revenue "of the magnitude predicted would almost inevitably foreshadow the disappearance of KIVA from telecasting" (p. 120), is now further supported by empirical evidence. The diversion of revenues because of the loss of network affiliations to the new grantees and because of the loss of local advertisers to KBLU-TV have been coupled with an unexpectedly bad television season to precipitate the impending disaster. Under the circumstances, it cannot be expected that KIVA will survive until a decision on the merits of this case and during the further Commission proceedings ordered on a possible remand. As the Court stated in Scripps-Howard

¹ Communications Act of 1934, as amended, Section 402(b)(6), 47 U.S.C. §402(b)(6).

Radio v. Federal Communications Commission, 316 U.S. 4, 10:

If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made.

There remains an opportunity, at this point, to prevent the irreparable injury to appellant from escalating into an irreparable public injury. A few months hence, and certainly before a decision on the merits can be rendered, it will be too late. After the demise of Station KIVA and the attendant irreparable public loss of service, the vindication of the principles involved in this case will be but an idle ceremony instead of judicial redress.

CONCLUSION

For the foregoing reasons the ruling of the panel of this Court, which denied appellant's Motion for Stay, should be reconsidered or reheard en banc.

Respectfully submitted,

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CERTIFICATE

I, Reed Miller, hereby certify that the foregoing petition for reconsideration or rehearing en banc is presented in good faith and not for delay.

Reed Miller

January 10, 1964

PROOF OF SERVICE

I, the undersigned Reed Miller, Counsel for the Appellant, Valley Telecasting Co., Inc., hereby certify that on this 10th day of January, 1964, I have sent by first-class mail, postage prepaid, a true copy of the foregoing Petition for Rehearing or Reconsideration En Banc to:

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